

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 08 CV 1490-AKH

DREW SCIENTIFIC, INC.,
Plaintiff

vs.

POINTCARE TECHNOLOGIES, INC.,
Defendants.

**AFFIDAVIT OF MICHAEL P. TWOHIG IN OPPOSITION TO DREW'S
MOTION FOR PRELIMINARY INJUNCTION**

I, Michael P. Twohig, declare:

1. I am an associate attorney at the law firm Burns & Levinson LLP and I represent PointCare Technologies, Inc. ("PointCare") in the above-captioned action. I make this affidavit in opposition to Drew Scientific, Inc. ("Drew")'s motion for preliminary injunction seeking to force PointCare to continue performing a contract it has rightfully terminated due to Drew's material breach.

2. The purpose of this affidavit is to place before the Court documents (not attached to the other affidavits submitted by PointCare in opposition to Drew's motion) evidencing why Drew's allegations are false and misleading and why Drew's motion should be denied.

3. A true and correct copy of excerpts from the deposition transcript of George Chappell are attached hereto as Exhibit A.

4. A true and correct copy of excerpts from the deposition transcript of Herbert Chow, Ph. D. along with a true and accurate copy of tab 8 to Exhibit 1 from the Chow deposition are attached hereto as Exhibit B.

5. A true and correct copy of excerpts from the deposition transcript of Richard J. DePiano are attached hereto as Exhibit C.

6. A true and correct copy of excerpts from the deposition transcript of Francis Matuszak along with a true and accurate copy of Exhibit 5 from the Matuszak deposition are attached hereto as Exhibit D.

7. A true and correct copy of excerpts from the deposition transcript of Linsey Rockingham are attached hereto as Exhibit E.

8. A true and correct copy of excerpts from the deposition transcript of (James) Gary Young along with true and accurate copies of Exhibits 7, 12, 13, and 18 from the Young deposition are attached hereto as Exhibit F.

9. A true and correct copy of "Drew Scientific Marketing Plan" (DR 31619-40), produced by Drew in discovery, is attached hereto as Exhibit G.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 28th day of April, 2008, in Boston, Massachusetts.

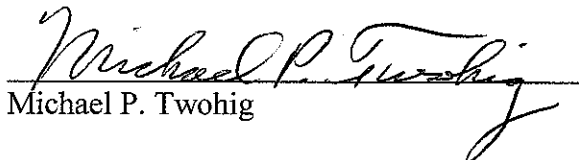

Michael P. Twohig

Exhibit A

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1 APPEARANCES
2
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1 MR. TWOHIG: Mr. Chappell, just before we
2 get started with the deposition, just want you to know
3 that if you need a break at any time, you let us know and
4 we're more than happy to oblige you. Okay?

5 THE WITNESS: Thank you.

6 MR. TWOHIG: The only thing I would ask --
7 and I'm sure your counsel will agree -- is that if there's
8 a question pending, let's get the answer to the question
9 first, then you can just let us know you need a break and
10 we'll break for you.

11 THE WITNESS: That's fine.

12 GEORGE CHAPPELL,
13 having been first duly sworn, testified as follows:

14 EXAMINATION

15 BY MR. TWOHIG:

16 Q. Could you state your full name for the record,
17 please.

18 A. George Dennis Chappell, Sr.

19 Q. And what's your residential address, sir?

20 A. 115 Settlers Creek Drive, DeSoto, Texas.

21 Q. And how about your business address?

22 A. 4230 Shilling Way, Dallas, Texas.

23 Q. And are you employed by Drew Scientific?

24 A. That is correct.

25 Q. Now, Mr. Chappell, I'd just like you, if you

Page 7

1 would, to give us a brief educational background, starting
2 with college.

3 A. I received a bachelor's degree in electrical
4 engineering from the University of Texas at Arlington.

5 Q. Did you do any studies after that?

6 A. No, sir.

7 Q. Do you have any additional education; for
8 example, professional seminars or training in your field?

9 A. I suppose I would. I don't know that I could
10 recall all of them.

11 Q. What types of seminars or professional training
12 have you had, then, over the years since college?

13 A. I've had training in certain
14 application-specific software that I use in my job.

15 Q. Which ones?

16 A. In the schematic capture and PC board layout,
17 circuit simulation. Those are all I can recall at the
18 moment.

19 Q. Okay. And where did you have those -- what were
20 they? Were they training seminars or courses, or how
21 would you characterize them?

22 A. They were training seminars.

23 Q. And who provided those to you?

24 A. The supplier of the software.

25 Q. And is it one software supplier we're talking

Page 8

1 about?

2 A. No. There were several.

3 Q. And who were the different software suppliers
4 that we're talking about? If you can't recall, you can
5 just answer that way.

6 A. One was a company called Viewlogic.

7 Q. Okay. Do you remember any of the others?

8 A. Another was a company called Dataflow.

9 Q. Okay. Any others?

10 A. One was Texas Instruments.

11 Q. Okay. Any others?

12 A. Not that I can recall.

13 Q. All right. Now, I might have missed it, but did
14 you tell me the year of your graduation when you got your
15 bachelor's degree in electrical engineering?

16 A. I don't believe I did.

17 Q. Will you tell me now?

18 A. I believe that was 1980.

19 Q. So other than those seminars or training courses
20 that you mentioned in connection with software that you
21 use, any other training in your field that you recall at
22 this time?

23 A. Just 30 years' on-the-job experience.

24 Q. On-the-job training?

25 A. Yes, sir.

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1 Q. Okay. Now, where did you start working after
2 you graduated from college?

3 A. Could you be more specific?

4 Q. Well, let me ask you this: When did you start
5 working in the engineering field?

6 A. I'm not sure. Probably about 1977.

7 Q. Okay. So was that during the time that you were
8 attending college?

9 A. Yes.

10 Q. Let me ask you this: When did you start working
11 for Drew?

12 A. Well, of course, we were acquired by Drew.

13 Q. Okay. Who were you working for when Drew
14 acquired your company?

15 A. I was working for MWI, Incorporated.

16 Q. MWI, Incorporated?

17 A. Yes, sir.

18 MR. DELLAPORTAS: Objection. Asked and
19 answered.

20 MR. TWOHIG: Okay, John.

21 Q. (By Mr. Twohig) What was MWI, Incorporated's
22 business?

23 A. Electronic manufacturing.

24 Q. What type of electronics?

25 A. Various. Some medical instrumentation, some

<p style="text-align: right;">Page 10</p> <p>1 well logging instrumentation. Just various types of 2 instrumentation.</p> <p>3 Q. How long were you in the employ of MWI, 4 Incorporated?</p> <p>5 A. Since its beginning, in 1985.</p> <p>6 Q. And let me ask you this: You said that MWI, 7 Incorporated was acquired by Drew?</p> <p>8 A. That's correct.</p> <p>9 Q. When did that acquisition take place?</p> <p>10 A. I don't remember the exact date.</p> <p>11 Q. Can you give me a year?</p> <p>12 A. It would be a guess.</p> <p>13 Q. Can you give me an educated guess and a ballpark 14 figure?</p> <p>15 A. I believe it was about 2000.</p> <p>16 Q. Approximately 2000?</p> <p>17 A. I believe. It may have been --</p> <p>18 MR. DELLAPORTAS: Objection. Asked and 19 answered.</p> <p>20 A. -- April of 2001. I don't remember.</p> <p>21 Q. (By Mr. Twohig) So you're placing it somewhere 22 in the 2000-2001 time frame?</p> <p>23 MR. DELLAPORTAS: Objection. Asked and 24 answered. Let's move on, please.</p> <p>25 Q. (By Mr. Twohig) You can answer the question,</p>	<p style="text-align: right;">Page 11</p> <p>1 Mr. Chappell.</p> <p>2 A. Yes.</p> <p>3 Q. Thank you, sir.</p> <p>4 Now, prior to starting with MWI, Inc. in about 5 1985, did you work in the engineering field prior to that?</p> <p>6 A. Yes.</p> <p>7 Q. Who did you work for?</p> <p>8 A. Simplec Manufacturing.</p> <p>9 Q. And where were they located?</p> <p>10 A. 4230 Shilling Way, Dallas, Texas.</p> <p>11 Q. Now, where was MWI, Inc. located?</p> <p>12 A. They weren't. Well, excuse me. At what time?</p> <p>13 Q. When you were working for them.</p> <p>14 A. 4230 Shilling Way, Dallas, Texas.</p> <p>15 Q. Was -- I'm not sure if I'm going to get the name 16 right, but was Simplec Manufacturing acquired by MWI?</p> <p>17 A. I really don't know all the details. I don't 18 know if you would call it an acquisition or...</p> <p>19 Q. Okay. In any event, it seems like you were 20 working in the same location when you were at Simplec and 21 when you were at MWI and also when you were at Drew. Is 22 that fair to say?</p> <p>23 A. That's correct.</p> <p>24 Q. What about your positions with these three 25 companies. Why don't you tell me what you started off as</p>
<p style="text-align: right;">Page 12</p> <p>1 with Simplec.</p> <p>2 A. I started as a test technician.</p> <p>3 Q. Okay. And did you progress to any other 4 position with Simplec?</p> <p>5 A. Engineering manager.</p> <p>6 Q. Okay. Did you progress to any other position 7 with them?</p> <p>8 A. No.</p> <p>9 Q. All right. What about when you were working 10 with MWI, Inc., what position did you start out with them?</p> <p>11 A. Engineering manager.</p> <p>12 Q. Did you progress to any other position with MWI, 13 Inc.?</p> <p>14 A. No. Well, I changed positions.</p> <p>15 Q. What position did you change to?</p> <p>16 A. Chief engineer.</p> <p>17 Q. And what about when you were working with Drew, 18 What position did you start out with Drew?</p> <p>19 A. Chief engineer.</p> <p>20 Q. Did you progress to any other position with 21 Drew?</p> <p>22 A. No, sir.</p> <p>23 Q. Are you still a chief engineer today for Drew?</p> <p>24 A. That's correct.</p> <p>25 Q. When did you make that progression to chief</p>	<p style="text-align: right;">Page 13</p> <p>1 engineer with Drew?</p> <p>2 A. I think I've already answered that question.</p> <p>3 MR. DELLAPORTAS: Objection.</p> <p>4 Q. (By Mr. Twohig) I'm not sure if you did, but if 5 you'd just answer it for me now, I'd appreciate it.</p> <p>6 MR. DELLAPORTAS: Objection. Asked and 7 answered.</p> <p>8 George, before you answer questions, if I'm 9 stating an objection, I would ask you to hold off until 10 I've completed my objection.</p> <p>11 Q. (By Mr. Twohig) You can go ahead now.</p> <p>12 A. I said I was the chief engineer at MWI, Inc. and 13 I was the chief engineer at Drew Scientific.</p> <p>14 Q. Okay. And I believe you placed -- that would 15 place us in 2000, then, when Drew -- or 2000 or 2001 time 16 period when Drew took over MWI, right?</p> <p>17 A. That's correct.</p> <p>18 Q. Why don't you tell me what your duties and 19 responsibilities are as chief engineer at Drew.</p> <p>20 MR. DELLAPORTAS: Objection. Compound.</p> <p>21 Q. (By Mr. Twohig) Go ahead, Mr. Chappell.</p> <p>22 A. I do most of the circuit design, printed circuit 23 board design, firmware design for the various projects 24 that we work on.</p> <p>25 Q. Any other duties and responsibilities?</p>

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1 him about it anyway. So one last time, are you
2 instructing him not to answer?

3 MR. DELLAPORTAS: I stated my position and
4 it's a standing instruction and a standing objection as it
5 goes to the whole case.

6 THE REPORTER: I'm not hearing in New York
7 real well. Can you pull the microphone closer to you?

8 MR. DELLAPORTAS: The microphones here,
9 annoyingly, are kind of built into the table, so I'll try
10 to speak a little closer.

11 THE REPORTER: That's better. Thank you.

12 Q. (By Mr. Twohig) Mr. Chappell, are you going to
13 answer my question?

14 A. My attorney just advised me not to, I thought.

15 Q. Are you going to answer my question, yes or no?

16 MR. DELLAPORTAS: I think he said no, but
17 to the extent --

18 MR. TWOHIG: I just want to get that on the
19 record.

20 A. No.

21 Q. (By Mr. Twohig) So you're refusing to answer
22 the question?

23 MR. DELLAPORTAS: Objection. Asked and
24 answered. Move on. You got your no.

25 Q. (By Mr. Twohig) Did you work on a project with

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1 PointCare Technologies?

2 A. Yes, sir.

3 Q. And what was that project about? Did it have a
4 name?

5 A. It was called the CD4 project.

6 Q. Okay. And were you working on developing an
7 instrument?

8 A. We were working on modifying an instrument that
9 we had previously developed to add the CD4 parameter to
10 it.

11 Q. Okay. And the instrument that you had
12 previously developed, you're referring to Drew's XL22?

13 A. No, sir.

14 Q. Which instrument are you referring to?

15 A. The Drew 2280.

16 Q. The Drew 2280?

17 A. Yes, sir.

18 Q. When was the Drew 2280 designed and developmen
19 completed?

20 A. Just before we started the CD4 project.

21 Q. When do you recall starting the CD4 project?

22 A. I believe it was July of 2006.

23 Q. Now, the CD4 project, the instrument that was
24 being developed, was that also known as the HT?

25 A. I believe that's what other people called it,

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1 yes, sir.

2 Q. Okay. And did you or do you understand that HT
3 stands for High Throughput?

4 A. Yes, sir.

5 Q. Let me ask you this: Why don't we take a look
6 now at --

7 MR. TWOHIG: Jamie, if you could take out
8 Exhibit -- well, it's not Exhibit 2, but Document No. 2
9 and if you could mark that as Exhibit 1.

10 THE REPORTER: Okay.

11 (Exhibit 1 marked.)

12 Q. (By Mr. Twohig) Just to make sure we're looking
13 at the same document, Mr. Chappell, this should be a
14 one-page document and it says Attachment 1 to Annex 1 at
15 the top. Do you see that?

16 A. Yes, sir.

17 Q. And do you see that there are line items, 46
18 line items?

19 A. Yes, sir.

20 Q. And do you see the date down in the bottom
21 left-hand side? It says 6/2/2006.

22 A. Yes, sir.

23 Q. Okay. Have you ever seen this document before?

24 A. I don't recall.

25 Q. Have you ever seen a document like this with

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1 respect to the CD4 project?

2 MR. DELLAPORTAS: Object to form.

3 A. Yes, sir.

4 Q. (By Mr. Twohig) Okay. And the document that
5 you're thinking of that is like this and it was referring
6 to the CD4 project, do you recall when you first saw that
7 document?

8 A. No, sir.

9 Q. Do you know who created the document that you're
10 thinking of?

11 A. There were several people making schedules then.
12 I'm not really sure, no.

13 MR. TWOHIG: Jamie, if you could, mark
14 Document No. 6 as Exhibit 2 and hand it to the witness.

15 (Exhibit 2 marked.)

16 THE REPORTER: Okay.

17 Q. (By Mr. Twohig) Mr. Chappell, do you have that
18 Exhibit 2 in front of you now?

19 A. Yes, sir.

20 Q. And just to make sure we're talking about the
21 same thing, this is another document with 46 line items
22 and it has a date down in the lower left corner of
23 10/2/2007. Do you see that?

24 A. Yes, sir.

25 Q. Is that the document that you're thinking of?

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1 you see that?
 2 A. Yes, sir.
 3 Q. And then if you look over on the right side, do
 4 you see where there are, again, those horizontal blocks,
 5 some of them followed by initials. Do you see those?
 6 A. Yes, sir.
 7 Q. I notice, for example, if you look over at
 8 Line 17 and you look across, you see Line 17 where it says
 9 "fluid routing"?
 10 A. Yes, sir.
 11 Q. And then if you look over it says -- where the
 12 horizontal block is, the initials are DME?
 13 A. Yes, sir.
 14 Q. What do you understand DME to be referring to?
 15 A. I don't know.
 16 Q. Let me ask you this: Do you sometimes have
 17 timelines and product development lines for projects that
 18 you're working on at Drew?
 19 A. Yes, sir.
 20 Q. And do you ever use DME to stand for Drew
 21 Mechanical Engineers?
 22 A. I've never seen it before.
 23 Q. Do you ever use DM to stand for Drew
 24 Manufacturing?
 25 A. No, sir.

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1 sir.
 2 Q. Okay. Now, is it your understanding that what
 3 was supposed to take place in this CD4 project was that
 4 Drew was supposed to modify its XL22 platform to
 5 accommodate PointCare's CD4 assay?
 6 MR. DELLAPORTAS: Object to form.
 7 A. It was my understanding we were going to modify
 8 the 2280 platform.
 9 Q. (By Mr. Twohig) Okay. And was it your
 10 understanding that Drew would be responsible for the
 11 engineering tasks involved in that effort?
 12 A. Not all of the engineering tasks, no, sir.
 13 Q. Okay. Why don't you tell me which engineering
 14 tasks you believe Drew was going to be responsible for.
 15 MR. DELLAPORTAS: I'm going to object to
 16 form there.
 17 A. I believe we were to be responsible for the
 18 hardware modification, the addition of any electronics
 19 that were necessary for those hardware modifications, and,
 20 of course, the firmware to go with the additional
 21 electronics, and I understood that we had a joint
 22 responsibility on the software.
 23 Q. (By Mr. Twohig) Okay. Any other engineering
 24 tasks that you believe Drew was responsible for on the CD4
 25 project?

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1 Q. Okay. So just one final question on this. Is
 2 it fair to say that you're still not sure if you've ever
 3 seen this particular timeline before?
 4 MR. DELLAPORTAS: Objection. Asked and
 5 answered.
 6 A. Yes, sir.
 7 Q. (By Mr. Twohig) Okay. Thank you, Mr. Chappell.
 8 Mr. Chappell, what is your understanding of the
 9 business relationship between Drew and PointCare? Do you
 10 understand -- let me ask you a better question.
 11 Do you understand that the business relationship
 12 with Drew and PointCare is specifically the development of
 13 this CD4 project?
 14 A. Yes, sir. I understand it was a joint effort.
 15 Q. Go ahead. I can't hear you.
 16 A. I understood that it was a joint effort between
 17 Drew and PointCare.
 18 Q. To develop the CD4 instrument?
 19 A. That's correct.
 20 Q. Also known as the HT?
 21 A. Yes, sir.
 22 Q. Okay. Did you work on that effort?
 23 A. Yes, sir.
 24 Q. Did you work on it from its inception?
 25 A. From the inception of the formal project, yes,

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1 A. I think that was it, mainly. Well, Drew was --
 2 I think we were also assigned the responsibility of some
 3 of the regulatory testing and environmental testing. And
 4 again, I don't think any responsibility was cast in stone
 5 as far as Drew was concerned. It was done with the advice
 6 and consent of the PointCare personnel as well.
 7 Q. Well, just so that I understand you here, do you
 8 mean to say that there was some sort of agreement between
 9 Drew and PointCare as to what Drew was responsible for,
 10 what PointCare was responsible for, and what things were
 11 joint responsibility?
 12 MR. DELLAPORTAS: Object to form.
 13 A. There may have been something like that.
 14 Q. (By Mr. Twohig) Okay. I have your list of
 15 things, and you mentioned some things that Drew is
 16 responsible for. You mentioned at least one thing that
 17 was joint responsibility. At the tail end of your list
 18 you mentioned regulatory testing and environmental
 19 testing.
 20 A. Yes, sir.
 21 Q. Did you understand that -- I'm sorry.
 22 Did you understand that Drew was going to be
 23 responsible for the regulatory testing and environmental
 24 testing or only parts of those?
 25 MR. DELLAPORTAS: Object to form.

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1 A. It was my understanding that we would be
2 responsible for the environmental testing and for part of
3 the regulatory testing that involved the low-voltage
4 safety and the CE mark. Those are normally the only parts
5 that I'm involved with.

6 **Q. (By Mr. Twohig) I didn't fully understand the**
7 **phrase. You said something about safety.**

8 A. Low-voltage safety.

9 **Q. Low-voltage, okay. Thank you.**

10 **I want to go back and focus on the first three**
11 **things that you had mentioned.**

12 **You mentioned that Drew would be responsible for**
13 **hardware modification. Can you tell me what hardware**
14 **modification was entailed in this project?**

15 A. It mostly centered around the mixing cuvette,
16 which was the device that was added to mix the new
17 reagents and the patient sample to prepare it for the CD4
18 measurement.

19 **Q. Okay. And what were the other hardware**
20 **modifications?**

21 A. We also had to add an additional sensor to the
22 optics head for detecting the CD4 particles.

23 **Q. Okay. What other hardware modifications?**

24 A. We also modified the -- what we call the slide
25 valve in order to eliminate other devices that we might

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1 have used to direct the fluids and conserve space so we
2 could get everything to fit in the package.

3 **Q. So the modification of the slide valve, did that**
4 **pertain to the fluidics part of the device?**

5 A. Yes, sir.

6 **Q. Any other hardware modifications on the CD4**
7 **project?**

8 A. There were some modifications made to the
9 fluidics, some valves added, minor things, but those --
10 the mixing cuvettes and there were some pumps to support
11 the mixing cuvette. We also added a dual syringe pump to
12 deliver the lyse and quenching reagents, and we also had
13 to modify the reagent detector board to add inputs for the
14 four new reagents, or three, however many new reagents
15 there were.

16 **Q. Okay. The last two that you just mentioned, you**
17 **mentioned modify the reagent detector board, and just**
18 **prior to that you also -- I didn't catch that whole one.**
19 **I think you said you added some pumps.**

20 A. Two peristaltic pumps for metering the new
21 reagents.

22 **Q. Mini pumps or micro pumps?**

23 A. Peristaltic pumps.

24 **Q. Okay. Let's -- anything else that you want to**
25 **add to this list of hardware modifications? Let me**

Page 40

1 **rephrase the question.**

2 **Are there any other hardware modifications that**
3 **you would list?**

4 A. We also designed a reservoir to hold the gold
5 reagent.

6 **Q. Okay. Mr. Chappell, were you involved in all of**
7 **these hardware modification tasks?**

8 A. I was in all except the reagent detection board.
9 I didn't have too much involvement in it.

10 **Q. Who was the main person involved in that?**

11 A. It was Jerry West and Karl Gu.

12 **Q. But in all of the other hardware modification**
13 **tasks that you mentioned previously, were you very**
14 **involved?**

15 A. Yes, sir.

16 **Q. Now, I believe you said that you believe you**
17 **became involved in the project and that the project**
18 **started formally in approximately July of 2006. Is that**
19 **accurate?**

20 A. Best of my knowledge, yes, sir.

21 **Q. And were you involved, then, undertaking these**
22 **hardware modification tasks from that point in time**
23 **onwards?**

24 A. Yes, sir.

25 **Q. And are you still involved in that today?**

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1 A. Until, oh, about three or four weeks ago.

2 **Q. Okay. And what were you still working on three**
3 **or four weeks ago when you stopped being involved?**

4 A. What we call the shipping decks.

5 **Q. The shipping decks?**

6 A. Yes, sir.

7 **Q. What were you doing with the shipping decks?**

8 A. Trying to streamline their operation so that we
9 could prepare an instrument for shipping without removing
10 the cover.

11 **Q. Who were you going to be shipping the instrumen**
12 **to?**

13 A. Customers, I suppose.

14 **Q. Do you not know?**

15 A. I really don't understand your question. Which
16 instrument are you talking about?

17 **Q. I'm talking about the HT instrument, the CD4**
18 **instrument.**

19 A. Well, of course.

20 **Q. Is that the same one you're talking about?**

21 A. Yes, sir.

22 **Q. Okay. So are you just not sure who you were**
23 **preparing -- let me rephrase the question.**

24 **Are you saying you were doing this generally in**
25 **preparation for shipping?**

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1 A. That's correct. It's part of every instrument
2 project, so it was not for any one specific instrument.

3 Q. Okay. And let me back up for one second.

4 So the shipping decks that you were referring
5 to, can you just describe them, tell me what they are?

6 A. They are pieces of software that control the
7 pumps and motors and hardware in the analyzer. In this
8 case, the object was to control these devices in such a
9 manner that we could rinse and then dry -- rinse,
10 sanitize, and dry all of the fluidics inside the
11 instrument in preparation to ship it.

12 Q. Now, what stage of product development, design
13 and development, would that be in?

14 A. Could you be more specific?

15 Q. Well, this CD4 project was a project that you
16 were designing and developing an instrument, correct?

17 A. Yes, sir.

18 Q. And I take it that the end point of that design
19 and development is to get to an instrument that is going
20 to be manufacturable and reliable and that you're going to
21 be able to sell to customers, right?

22 A. That's correct.

23 Q. And I take it that this work that you were doing
24 three or four weeks ago with respect to the shipping decks
25 was something that you had to do prior to getting to that

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1 end point. Is that also correct?

2 MR. DELLAPORTAS: Object to form.

3 A. Yes, sir.

4 Q. (By Mr. Twohig) So what I'm trying to learn
5 here is how much prior to that end point was this task.

6 MR. DELLAPORTAS: Objection. Vague and...

7 THE REPORTER: I got the objection, vague.
8 Was that it or was there more to that objection?

9 MR. DELLAPORTAS: I'm sorry. Vague and
10 confusing.

11 A. I am confused. Are you talking about end point
12 of a project in general or -- I mean, the shipping decks
13 can be prepared at any time.

14 Q. (By Mr. Twohig) Okay. They can be prepared at
15 any time. That actually helps me out.

16 Let me ask you this: Did you finish that task,
17 trying to straighten out the shipping decks?

18 A. No, sir.

19 Q. So I take it -- and correct me if I'm wrong --
20 you were instructed at that point to just stop that task.

21 A. I was never instructed directly to stop it.

22 Q. But you did stop?

23 A. Yes, sir.

24 Q. Okay. If you were going to continue on with
25 your engineering effort on the CD4 project, you would have

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1 to pick up and continue that task, right?

2 A. Yes, sir.

3 Q. What other tasks would be remaining in the
4 engineering effort if you pick the project back up?

5 A. We would still need to do the environmental
6 testing. We would still need to do the regulatory
7 testing, and I would think that we would have to also have
8 input from PointCare on finalizing the measurement cycle,
9 preparation of the sample and the measurement.

10 Q. What about reliability testing. Would you need
11 to do that?

12 A. Yes, sir. We would need to complete it.

13 Q. Did you already start that task?

14 A. Yes, sir. We've done some of it.

15 Q. Were you involved in that?

16 A. Yes, sir.

17 Q. What did that consist of?

18 A. So far, I think we've done what would be the
19 equivalent of a three-year life test on the slide valve.

20 Q. Is that the only reliability testing that you've
21 undertaken?

22 A. To the best of my recollection, yes, sir.

23 Q. And what other reliability testing do you
24 believe would be necessary for this instrument, the CD4
25 instrument?

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1 MR. DELLAPORTAS: Objection. Object to
2 form. Necessary for what purpose?

3 Q. (By Mr. Twohig) Go ahead, Mr. Chappell.

4 A. I don't know that I could give you an
5 all-inclusive list. I could tell you some of the other
6 things that come to mind would be --

7 Q. Why don't -- go ahead. Why don't you go ahead
8 and answer to the best of your ability.

9 MR. DELLAPORTAS: Same objection.

10 A. We would need to do some life testing on the
11 syringe pump that we designed for moving the lyse and
12 quench reagents; probably some testing on the peristaltic
13 pumps that we added.

14 Q. (By Mr. Twohig) Any other reliability testing
15 that you would undertake on the CD4 machine?

16 MR. DELLAPORTAS: Object to form.

17 Q. (By Mr. Twohig) Let me see if I can help you
18 out. How about with the optics head?

19 A. Yes. We did have some new parts there, so yeah,
20 we would probably do some testing on it.

21 Q. What about the ultrasonic sensor?

22 A. Yes, sir.

23 Q. So we have the syringe pump, the peristaltic
24 pump, the optics head, and the ultrasonic sensor. Any
25 other items that you can think of that you would do

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1 reliability testing on on the CD4 project?
 2 A. Well, we also added some stepping motors for
 3 mixing the reagents. They would probably test it in
 4 conjunction with the peristaltic pumps.
 5 Q. Any other items that you would do reliability
 6 testing to?
 7 A. Not that come to mind, no, sir.
 8 Q. What about the whole integrated system?
 9 A. I'm not sure how you would do a reliability test
 10 on the whole integrated system.
 11 Q. Okay. Even though you're not sure how it would
 12 be done, do you think it would be some reliability testing
 13 that should be done?
 14 A. There's testing that's done but what's not
 15 normally termed as reliability testing.
 16 Q. Okay. What type of testing is done with the
 17 integrated system?
 18 A. Usually verification and validation.
 19 Q. What does that consist of? And feel free to
 20 split those up and address them one at a time.
 21 A. Verification involves applying certain inputs
 22 and see if you get the predicted outputs by using
 23 measuring instruments such as volt meters, oscilloscopes,
 24 et cetera.
 25 Validation usually involves operating the system

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1 completed because you can't complete the software until
 2 the hardware is completed?
 3 A. I wouldn't think so, no.
 4 Q. So your understanding is that you can complete
 5 the software for the HT instrument prior to the completion
 6 of the hardware?
 7 MR. DELLAPORTAS: Objection. Asked and
 8 answered.
 9 A. I think it has to be before we can complete the
 10 hardware. Hardware and software design is always a joint
 11 effort and there's always fine-tuning back and forth. If
 12 we can't get at least a first cut of the completion of the
 13 software, we cannot finish the hardware test.
 14 Q. (By Mr. Twohig) So is it your testimony that
 15 you don't believe you got a first cut at the software for
 16 the HT instrument?
 17 A. Not that was complete enough for us to finish
 18 the project, no.
 19 Q. Now, can you be more specific? Which part of
 20 the software do you believe you did not get a complete
 21 enough version of?
 22 A. It's called the DLL.
 23 Q. The DLL?
 24 A. That's correct.
 25 Q. And what does that DLL do?

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1 for its intended use and see if you get the expected
 2 results and consistency that were demanded by the
 3 specifications.
 4 Q. Let me ask you this: Has any verification
 5 testing been done for the CD4 instrument?
 6 A. I think we have some verification data, yes,
 7 sir.
 8 Q. I take it that you haven't completed that
 9 verification testing, though, for the HT.
 10 A. No, sir. That's an ongoing process. It occurs
 11 throughout the life of the project, essentially.
 12 Q. And just to be clear here, I'm using CD4
 13 instrument and HT interchangeably. Do you understand that
 14 to be the case?
 15 A. Yes, sir.
 16 Q. What about validation. Has any validation work
 17 been done yet for the HT?
 18 A. No, sir. We can't.
 19 Q. Why is that?
 20 A. The software was never completed.
 21 Q. Now, I take it that you would need completed
 22 hardware and completed software to be able to do
 23 validation.
 24 A. That is correct.
 25 Q. And is the reason the software was never

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1 A. It takes the data that is generated during the
 2 measurement cycle and massages that data and analyzes it
 3 and prints it in such a manner that the operator can
 4 determine how well the instrument is working, and it also
 5 calculates the final results of the various parameters
 6 that the instrument is supposed to report.
 7 Q. Mr. Chappell, I just want to go back and go down
 8 the list of the hardware that you had testified about that
 9 you would do the reliability testing on.
 10 So just going back to the top of the list, I
 11 think the first thing you mentioned was the syringe pump
 12 and that you would do life testing on the syringe pump.
 13 Do you recall that?
 14 A. Yes, sir.
 15 Q. Can you tell me what -- what would that testing
 16 comprise?
 17 A. Mainly would determine how many times that pump
 18 would be exercised during the -- while you're measuring
 19 one CD4 sample, then multiply that number of times by an
 20 estimated number of samples per week that a lab might run
 21 and then multiply that by the number of samples that you
 22 might expect it to be measured in a three-year time
 23 period. Then we would usually modify the deck to exercise
 24 that pump that number of cycles and then disassemble the
 25 pump afterwards, take measurements, look for wear, so

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1 forth.
 2 **Q. How long would you expect that all that would**
 3 **take?**
 4 A. Maybe two or three weeks.
 5 **Q. And who would undertake that testing?**
 6 A. I would.
 7 **Q. Alone?**
 8 A. No. I would probably supervise William Ross.
 9 **Q. And the two of you working on it would take two**
 10 **to three weeks?**
 11 A. Yes, sir.
 12 **Q. Why don't we go down to the second item on the**
 13 **list that you testified to, and that was the peristaltic**
 14 **pump.**
 15 A. Yes, sir.
 16 **Q. And what would you do with respect to the**
 17 **peristaltic pump for reliability testing?**
 18 A. It would be similar. We would determine how
 19 long that pump is operated during each measurement cycle,
 20 extend that to a three-year time period and then operate
 21 the pumps and, again -- probably we wouldn't look so much
 22 for wear in those. What we would look at is whether or
 23 not they still -- probably look at the accuracy of the
 24 fluids that were delivered, accuracy of the volumes of the
 25 fluids.

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1 Charles Pina.
 2 **Q. Can you spell that last name, please?**
 3 A. P-I-N-A.
 4 **Q. Do you know when that -- by the way, before I**
 5 **ask this, am I saying that correctly? Is it optics head**
 6 **or is it optic head?**
 7 A. Your choice.
 8 **Q. All right. Both work for you?**
 9 A. Yes, sir.
 10 **Q. Okay. When was that optic head developed?**
 11 A. It was in the '90s. I don't remember exactly
 12 when.
 13 **Q. Do you know if it was developed for the original**
 14 **XL22?**
 15 A. Yes, sir, it was.
 16 **Q. Okay. And was it modified for the XL2280?**
 17 A. Slightly.
 18 **Q. What was the slight modification?**
 19 A. We added a resistive heater to it.
 20 **Q. Why did you do that?**
 21 A. Because there was no longer enough heat
 22 generated inside the instrument to bring the optics head
 23 up to the required operating range if the ambient
 24 temperature were very low, at the low end of the operating
 25 specs.

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1 **Q. And who would do that testing?**
 2 A. Again, probably myself. I would probably
 3 supervise William.
 4 **Q. And how long would that take or how long would**
 5 **you anticipate that that would take?**
 6 A. Well, without actually running the numbers,
 7 again, maybe two or three weeks.
 8 **Q. The next item that you had mentioned was the**
 9 **optics head.**
 10 A. Yes, sir.
 11 **Q. And I'd ask you the same question. What type of**
 12 **reliability testing would you do for the optics head?**
 13 A. I'm not really sure, to tell the truth. I'm
 14 actually not --
 15 **Q. Why is that?**
 16 A. I'm actually not the resident expert on the
 17 optics head. I didn't design it originally and the man
 18 that did design it is gone. I would probably consult with
 19 some of the other people in the company and we would have
 20 to come to a consensus as to just what we would test
 21 there.
 22 **Q. Who is the person who did design the optics**
 23 **head?**
 24 A. Well, Gary Young worked on it in conjunction
 25 with Jerry West, and the engineer that's gone now is John

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1 **Q. Okay. What modifications were made for the CD4**
 2 **or HT instrument?**
 3 A. Modifications to what?
 4 **Q. To the optic head. Sorry.**
 5 A. We added a second photomultiplier tube at
 6 90 degrees to the flow cell.
 7 **Q. Is a photomultiplier -- do you abbreviate that**
 8 **as PMT?**
 9 A. Yes, sir.
 10 **Q. So you added a second PMT?**
 11 A. Yes, sir.
 12 **Q. Just going back for a second, did you**
 13 **participate in the modification to the 2280? And I'm**
 14 **referring to what you testified about adding the resistive**
 15 **heater.**
 16 A. Yes, sir.
 17 **Q. And did you participate in the modification for**
 18 **the HT project to the optic head? And that was adding the**
 19 **second PMT.**
 20 A. Yes, sir.
 21 **Q. Okay. And just to make sure that I understood**
 22 **this correctly, you testified that you feel that you're**
 23 **unable to give an estimate as to how long it would take to**
 24 **do the reliability testing for the optic head?**
 25 MR. DELLAPORTAS: Objection. Asked and

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1 answered.

2 A. No, sir, because I'm not sure exactly what we
3 would be testing.

4 Q. (By Mr. Twohig) Okay. Fair enough.

5 Let me move on to the next item that you
6 testified about, the ultrasonic sensor. Can you please
7 tell me what you would do for reliability testing for the
8 ultrasonic sensor?

9 A. It would probably be tested in conjunction with
10 the peristaltic pumps since that's the reason it's in the
11 circuit. So it would probably -- reliability testing for
12 it will be done in parallel with the peristaltic pumps.

13 Q. So that would be done over the same time period?

14 A. Yes, sir.

15 Q. And the same people would be involved?

16 A. Yes, sir.

17 Q. Okay. What about the stepping motors. I
18 believe that was the next item that you had referenced.
19 What type of reliability testing would you do on those?

20 A. Did I mention stepping motors?

21 Q. I believe you did. I think for the mixer.

22 A. Oh, I'm sorry.

23 Q. That's okay.

24 A. Essentially the same thing. We would just
25 determine how long each motor is operated during a

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1 measurement cycle and at what speeds, project that over a
2 three-year life and then exercise them. Those we could
3 run without having to move any reagents, probably, so
4 that's something that we would probably run 24 hours a day
5 and maybe finish that within a week or two.

6 Q. And who would do that testing?

7 A. Myself and William Ross.

8 Q. Let me ask you this: Do you usually work on
9 more than one project at a time, Mr. Chappell?

10 A. Depends upon what the project is.

11 Q. Let me ask you, over the course of 2006 and
12 2007, from the point when you started working on the HT
13 CD4 project, were you working on multiple projects during
14 that time period?

15 MR. DELLAPORTAS: Object to form.

16 A. I did work on some other projects when there
17 were gaps in the schedule in the CD4 project when I --
18 when it was not possible for me to do anything else.

19 Q. (By Mr. Twohig) Is it your testimony that there
20 were points in time during the CD4 project when you were
21 unable to do anything to -- excuse me -- unable to do any
22 work on the project?

23 A. That's correct.

24 Q. And why was that?

25 A. PointCare had all our hardware.

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1 Q. So there --

2 A. They had the prototype.

3 Q. I'm sorry. I didn't hear.

4 A. They had the prototype hardware. I had nothing
5 to work on.

6 Q. How many prototypes did you have?

7 A. I think there were just two.

8 Q. So you never built a third?

9 A. There were some production prototypes that were
10 being built, but I don't think they were ever completed.

11 Q. So then to just clarify here, you had two
12 prototypes that were completed; is that correct?

13 A. Yes, sir.

14 Q. And can you tell me when they were both
15 completed?

16 A. Sometime in the spring of 2007. I couldn't tell
17 you exactly when, no, sir.

18 Q. Do you believe they were both completed around
19 the same time?

20 A. Within a few weeks of one another. We sent
21 PointCare one prototype, got some feedback from them, and
22 then got the second one up to the same level as the first
23 and then shipped to them.

24 Q. So is it your testimony that you sent both
25 prototypes to PointCare at some point in time?

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1 A. Pretty sure that's correct, yes.

2 Q. And did they send one back to you, or is it your
3 testimony that both prototypes remained at PointCare for
4 some period?

5 MR. DELLAPORTAS: Objection. Compound,
6 vague, and confusing.

7 A. Sometimes they had both of them. Sometimes they
8 would send one back to us and then we would ship it back
9 to them. Sometimes we had one; sometimes we didn't.

10 Q. (By Mr. Twohig) What was the longest period of
11 time, as you recall it, that you were without a prototype?

12 A. Probably two or three weeks. I couldn't tell
13 you exactly.

14 Q. Let me ask you this: I thought there was a plan
15 to make a third prototype. Are you aware of any plan to
16 make a third prototype instrument?

17 A. I don't remember if there was or not.

18 Q. Okay. Mr. Chappell, it's been a little bit of a
19 length here. Why don't we take another five-minute break
20 and give you a chance to stretch out. Does that sound
21 good?

22 MR. DELLAPORTAS: Michael, why don't we
23 take a lunch break?

24 MR. TWOHIG: I'm wondering about that. I
25 know for Mr. Chappell it's not quite noon. John, I guess

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1 A. No, sir.
 2 Q. -- that was sent -- excuse me?
 3 A. No, sir.
 4 Sorry. I thought you were finished.
 5 Q. I wasn't.
 6 You mentioned a few moments ago that a modified
 7 XL22 instrument was sent to PointCare during this
 8 feasibility analysis period. Do you recall that?
 9 A. Yes, sir.
 10 Q. Did you participate in making the modifications
 11 to that instrument?
 12 A. No, sir, I did not.
 13 Q. Do you know who did?
 14 A. I believe that was Roger Bourree and Gary Young.
 15 Q. And you mentioned some of the modifications that
 16 you believe were made. Are you also aware that optics
 17 were modified?
 18 A. Yes, sir. I'd forgotten that.
 19 Q. Okay. And would you agree that that was a
 20 pre-prototype HT?
 21 A. Not in the least.
 22 Q. You don't believe that was a pre-prototype HT?
 23 A. No.
 24 Q. How would you characterize it?
 25 A. It was just a modified instrument. I mean, the

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1 it fair to say based on what you've just testified to that
 2 you were intermittently involved in the project prior to
 3 that time?
 4 MR. DELLAPORTAS: Object to form.
 5 A. I don't think so.
 6 Q. (By Mr. Twohig) How would you characterize your
 7 involvement then? I'm speaking about the late '05, early
 8 2006 period.
 9 A. I was not involved at all. It was -- everything
 10 was being kept very confidential, and apparently I was not
 11 allowed to know what was going on.
 12 Q. Okay. I understand. So other than the little
 13 bit of information that you've just provided in your
 14 testimony, you were not involved?
 15 A. No, sir.
 16 MR. TWOHIG: Jamie, if you could take out
 17 Document No. 7 and mark that as the next exhibit.
 18 THE REPORTER: Okay.
 19 (Exhibit 4 marked.)
 20 Q. (By Mr. Twohig) Just so we're all on the same
 21 page here, do you see the Bates number down in the lower
 22 right-hand corner? It's a Drew document. It's marked
 23 DR6707. Do you see that?
 24 A. Yes, sir.
 25 MR. TWOHIG: John, you got that?

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1 HT, its main purpose in life was to perform the automatic
 2 preparation of the sample for the CD4 measurement where
 3 it's -- XL22, the sample had to be prepared manually and
 4 then dumped into the instrument.
 5 Q. I'm sorry. Were you finished?
 6 A. You know, it's kind of comparing apples to
 7 oranges.
 8 Q. Because that modified instrument that was sent
 9 during the feasibility period lacked the automated
 10 capacity to prepare the samples?
 11 A. That's correct.
 12 Q. Were you aware of the -- back up for a second.
 13 This modified instrument that you were just
 14 testifying about that was sent to PointCare during the
 15 feasibility period, are you aware of the results that were
 16 obtained at PointCare during that testing period?
 17 A. Not during the period. I didn't become aware of
 18 the results until sometime later.
 19 Q. When was it that you first became aware of
 20 testing results obtained with the modified instrument?
 21 A. It's probably sometime in the spring of 2006,
 22 and I was never given any formal data. Just it worked, or
 23 appeared to work.
 24 Q. So you previously testified that you formally
 25 became involved in the project in about July of '06. Is

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1 MR. DELLAPORTAS: Yup.
 2 Q. (By Mr. Twohig) So, Mr. Chappell, you can see
 3 that this is an email from Andrew Kenney to several people
 4 at Drew and it's dated May 17 of 2006. Do you see that?
 5 A. Yes, sir.
 6 Q. And the subject reference is CD4 project
 7 meeting. Do you see that?
 8 A. Yes, sir.
 9 Q. If you can, look at the text of the email. It
 10 reads, It seems as if this project is going to start with
 11 a vengeance. Do you see that first line there?
 12 A. Yes, sir.
 13 Q. Now, do you recall receiving this email at the
 14 time?
 15 A. I believe so, yes, sir.
 16 Q. And do you recall that at that time when the CD4
 17 project was getting underway that there was a sense of
 18 urgency at Drew to get the project moving along?
 19 A. Yes, sir.
 20 Q. And why was there a sense of urgency to move the
 21 project along?
 22 A. I don't know.
 23 Q. Do you see the next line there Mr. Kenney
 24 states, We need an urgent and probably lengthy meeting to
 25 get things started. Do you see that?

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1 urgency at that point in time with the project?
 2 MR. DELLAPORTAS: Objection. Asked and
 3 answered.
 4 A. Yes, sir.
 5 Q. (By Mr. Twohig) And do you recall why there was
 6 a sense of urgency at that point in time?
 7 MR. DELLAPORTAS: Objection. Calls for
 8 speculation.
 9 A. The way it was explained to me, as I recall now,
 10 after thinking about it, was that PointCare was also
 11 working with another vendor on a similar instrument and we
 12 wanted to try to get ours working first.
 13 Q. (By Mr. Twohig) Do you recall if that similar
 14 instrument was the NP, also known as the Near Patient?
 15 A. No, I don't.
 16 Q. Do you recall if that instrument was also a CD4
 17 instrument?
 18 A. Yes, sir.
 19 Q. Okay. And to your knowledge, was it similar in
 20 some respects to the HT?
 21 A. Yes, sir.
 22 Q. Is it your understanding that it was a smaller
 23 version of the HT in some respects?
 24 MR. DELLAPORTAS: Object to form.
 25 A. It was my understanding it was smaller and

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1 a Bates No. DR15340?
 2 A. Yes, sir.
 3 MR. TWOHIG: And that's been marked as
 4 exhibit number what, Jamie?
 5 THE REPORTER: That's 6.
 6 Q. (By Mr. Twohig) So looking at this document
 7 that's been marked Exhibit No. 6 -- and we don't need to
 8 discuss the email. I see that you're not part of that
 9 email, but if you would, turn over -- first I'll just
 10 point out for the record, you see on the email it mentions
 11 an attachment, product initiation and approvals? Do you
 12 see that?
 13 A. Yes, sir.
 14 Q. Actually, stay with the email for a second. I
 15 want to ask you a question about that.
 16 It references in the text of the email, it says
 17 a project initiation document.
 18 A. Yes, sir.
 19 Q. Is that a specific form?
 20 A. Yes, sir.
 21 Q. Are you familiar with that form?
 22 A. Yes, sir.
 23 Q. When are those required?
 24 A. Before the start of the project.
 25 Q. And what's supposed to be included in that form?

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1 slower.
 2 Q. (By Mr. Twohig) Okay. Portable?
 3 A. I don't recall that word ever being used, no,
 4 sir.
 5 Q. Now, was there any other reason why there was a
 6 sense of urgency in developing the HT at this point in
 7 time?
 8 A. I'm rarely given such information. No.
 9 Q. Were you aware of any deadlines on the project
 10 at that point in time?
 11 A. I was aware of some goals.
 12 Q. But as far as you know, there were no deadlines
 13 in place for that project?
 14 A. As I said, I knew that there were some projected
 15 goals, but I was never informed of any hard and fast
 16 deadlines, no, sir.
 17 Q. So you weren't aware of any contractual
 18 deadlines for the project?
 19 A. No, sir.
 20 MR. TWOHIG: Jamie, if you could take out
 21 Document No. 9 and mark that as the next exhibit.
 22 THE REPORTER: Okay. No. 6.
 23 (Exhibit 6 marked.)
 24 Q. (By Mr. Twohig) Just to make sure we're on the
 25 same page here, Mr. Chappell, do you have a document with

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1 A. Well, I'm familiar with the concept of the
 2 document. I've never initiated one, so I don't know all
 3 the details, but it's basically a document to get approval
 4 from upper management to do a project.
 5 Q. And as far as you're aware, those are prepared
 6 at the start of any project?
 7 A. I believe, according to our quality system, yes,
 8 it must be prepared before you can start the project.
 9 Q. And I see in that email there -- you see the
 10 reference the QS?
 11 A. Yes, sir.
 12 Q. Do you understand that to be referring to
 13 Quality System?
 14 A. Yes, sir.
 15 Q. Why don't we turn over and take a look at the
 16 attachment. Does this appear to be what you would
 17 recognize as a project initiation document?
 18 A. Well, these documents change from time to time.
 19 That may be what we were using at the time.
 20 Q. And, in fact, if you look at the document title,
 21 it does say "project initiation" in it?
 22 A. Yes, sir.
 23 Q. And specifically it's for the CD4 analyzer,
 24 right?
 25 A. Yes, sir.

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1 Q. Now, do you notice the date on the document?
 2 A. Yes, sir.
 3 Q. And what do you see that date to be?
 4 A. May 19th, 2006.
 5 Q. And if you flip over to the -- it says Page 2
 6 out of 3. You see right up at the top it says Inaugural
 7 Project Meeting held May 19, 2006?
 8 A. Uh-huh.
 9 Q. Could you just give a verbal answer?
 10 A. Yes, sir. I'm sorry.
 11 Q. That's okay. We just need to do that for the
 12 court reporter.
 13 A. I'm sorry.
 14 Q. That's all right.
 15 Do you see there the list of attendees?
 16 A. Yes, sir.
 17 Q. Do you see your name on that list?
 18 A. Yes, sir.
 19 Q. Do you recall attending that meeting?
 20 A. As I stated before, the meeting I recall that
 21 started the project was the one in which the PointCare
 22 representatives were there, and I don't see them listed
 23 here, so my memory must be faulty. It says I was there,
 24 so I must have been there.
 25 Q. So just so I understand, you don't recall

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1 no longer serving as the project leader?
 2 A. Yes.
 3 Q. Do you know when that point in time was?
 4 A. When he was no longer the engineering manager.
 5 Q. Now, if you -- we're working our way down that
 6 Page 2 there. You see where it says the customer
 7 specification was reviewed?
 8 A. Yes, sir.
 9 Q. Do you remember reviewing the customer
 10 specification?
 11 A. Yes, sir, I do. You jogged my memory.
 12 Q. Now, you just said "you jogged my memory." Do
 13 you remember doing it in the presence of the other team
 14 members?
 15 A. Yes. I think I recall this meeting now, and we
 16 did discuss -- we did see the specifications for the first
 17 time, that's correct.
 18 Q. And if we can just take a look back, I believe
 19 it might be Exhibit 2. It was document No. 3. You see
 20 the product specifications for the HT instrument?
 21 A. Yes, sir.
 22 Q. Are those the specifications that you recall
 23 reviewing at that meeting?
 24 A. Well, I would have to have some time to go over
 25 it to see if these were the exact ones at that point in

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1 attending the meeting referenced here?
 2 A. If it's the one where Peter Hansen and Don Barry
 3 were present, yes, I do. That's what I recall as being
 4 the start.
 5 Q. But assuming that the list of attendees here is
 6 correct, you don't remember attending an inaugural meeting
 7 where Peter Hansen and Don Barry were not present, right?
 8 A. To the best of my recollection, that's correct.
 9 Q. It does say -- below the list of attendees it
 10 says Gary Young will be the Dallas-based project
 11 coordinator responsible for the project.
 12 A. Yes, sir.
 13 Q. Was Mr. Young, in fact, made the project leader
 14 for Drew on the HT project?
 15 A. I don't know that he was the project leader. He
 16 was mainly the liaison between Drew and PointCare, is my
 17 recollection.
 18 Q. Did the project ever have a project leader for
 19 Drew?
 20 A. Not that I recall.
 21 Q. Now, you notice --
 22 A. Excuse me. Excuse me, please. I forgot.
 23 Andrew Kenney was involved in the beginning, and I believe
 24 he was the project leader at the beginning, I believe.
 25 Q. Okay. But you believe that at some point he was

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1 time, but we did review something very similar to this.
 2 Q. Okay. That's actually sufficient. I'm not
 3 going to make you try and figure it out.
 4 Now, are you aware, Mr. Chappell, that a final
 5 set of specifications for the HT were agreed upon between
 6 Drew and PointCare and that they were made part of the
 7 contract?
 8 MR. DELLAPORTAS: Objection. Compound.
 9 A. Could you maybe separate those two questions?
 10 Q. (By Mr. Twohig) Let's see. I'll try it again.
 11 Are you aware that a final set of specifications
 12 for the HT was agreed upon between Drew and PointCare and
 13 made a part of the contract?
 14 MR. DELLAPORTAS: Same objection.
 15 A. All I can say is we reviewed these
 16 specifications, some changes were agreed upon, and whether
 17 or not they were made part of the contract, I have no
 18 idea. I was never privy to that information.
 19 Q. (By Mr. Twohig) Fair enough.
 20 Do you remember any discussion about the
 21 specifications you looked at with the other team members
 22 for Drew?
 23 A. Vaguely. I don't remember many --
 24 Q. Do you remember -- I'm sorry. Go ahead.
 25 A. I don't remember many of the details.

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1 optics head at that point in time?

2 A. Yes, sir.

3 Q. And what was the problem, as you recall it? And
4 if you flip over to Page 2, there's an email there from
5 Gary Young to Don and it's cc'd to you and it refers to a
6 conversation between you and Gary. Do you see that?

7 A. Uh-huh. Yes, sir.

8 Q. Does that help you to respond to my question?

9 A. Yes, sir.

10 Q. So what was the problem with the optics head?

11 A. I think we finally determined that it was
12 contamination on the injector or in the injection path.

13 Q. And what was the cause of that? Did you
14 determine the cause?

15 A. At that point in time, no, sir. We just -- I
16 believe we did take the head apart and inspect the parts
17 under a microscope and found some contamination.

18 Q. Now, it says here, I just spoke to George about
19 it. It appears the optic head is out of alignment.

20 So apparently Gary Young believed that that was
21 the problem at the time, right?

22 A. Yes, but he's not an optics expert.

23 Q. So was it later determined that the head was not
24 out of alignment but it was actually contamination, as you
25 just testified?

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1 Q. That's an April 10, 2007 email. Do you see
2 that?

3 A. Yes, sir.

4 Q. Okay. Again, this is an email from Gary Young
5 to Don Barry, right?

6 A. Yes, sir.

7 Q. And you're cc'd on it?

8 A. Yes, sir.

9 Q. And in the first paragraph there, he says, After
10 several hours of attempting to align the optic head, we've
11 concluded the problem's with the quartz flow cell glued to
12 the PEEK mount. Do you see that?

13 A. Yes, sir.

14 Q. So at this point in time is that what you came
15 to believe was the problem with the optic head?

16 A. Not really. I think we still thought it was
17 contamination. There were several theories, and we didn't
18 know really what to believe. This was some new behavior.
19 We'd been building these heads for many years and had
20 never seen the problems that we had here.

21 Q. Okay. In the next line it says, The spare we
22 had for just this problem have the same problem also. You
23 see that?

24 A. Yes.

25 Q. Now, that spare was in your possession in

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1 A. Yes, sir. I believe so.

2 Q. Okay. But apparently at that point in time --
3 well, let me ask you this: Gary suggested to Don that Don
4 try realigning the flow cell mount. Do you see that?

5 A. Yes, sir.

6 Q. And that was to try and realign the optic head,
7 right?

8 A. Yes, sir.

9 Q. Okay. So, obviously, at that point in time it
10 appears that Gary and you and Don were under the
11 impression that it was a misalignment of the optic head,
12 right?

13 A. I don't think we knew what it was. That was
14 just one of the troubleshooting steps we were going
15 through.

16 MR. TWOHIG: Let's take a look at the next
17 document, Document 22, if you'd mark that, Jamie.

18 THE REPORTER: Okay. No. 19.
19 (Exhibit 19 marked.)

20 MR. TWOHIG: So is this Exhibit 18, Jamie?

21 THE REPORTER: It's No. 19.

22 MR. TWOHIG: I'm sorry. Exhibit 19.

23 Q. (By Mr. Twohig) And just to confirm, it's
24 DR23777, Mr. Chappell?

25 A. Yes, sir.

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1 Dallas, right?

2 A. I assume that's what he's talking about. Again,
3 I didn't initiate this email.

4 MR. DELLAPORTAS: I would --

5 Q. (By Mr. Twohig) Okay. Well --

6 THE REPORTER: Will you repeat that one
7 more time?

8 MR. DELLAPORTAS: I would caution the
9 witness not to speculate.

10 THE REPORTER: Thank you.

11 Q. (By Mr. Twohig) Did you ever resolve the issue
12 of what the problem with the optic head was?

13 A. Yes, sir.

14 Q. And what was that resolution?

15 A. It was an error in the software.

16 Q. An error in the software?

17 A. Yes, sir.

18 Q. Which software?

19 A. It was the rinse deck, post-sample deck.

20 Q. Was that part of the firmware?

21 A. No, but it was my responsibility.

22 Q. Okay. You want to take a break?

23 A. Yes, please.

24 Q. Is five minutes good?

25 A. More or less.

Exhibit B

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 DREW SCIENTIFIC, INC.,
6 Plaintiff, Case No. 08 CV 1490-AKH
-vs-
7 POINTCARE TECHNOLOGIES, INC.,
8 Defendants.
9 -----X

10
11 DEPOSITION OF HERBERT CHOW, Ph.D.
12 New York, New York
13 March 25, 2008
14
15
16
17
18
19
20

21 Reported by:
Bonnie Pruszyński, RMR
22 JOB NO. 15871
23
24
25

<p style="text-align: right;">Page 2</p> <p>1 2 March 25, 2008 3 8:55 a.m. 4 5 6 Deposition of HERBERT CHOW, Ph.D. 7 held at DUANE MORRIS, LLP, 1540 Broadway, 8 New York, New York, before Bonnie 9 Pruszyński, Registered Professional 10 Reporter, Registered Merit Reporter, 11 Certified LiveNote Reporter, and a Notary 12 Public of the State of New York. 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 3</p> <p>1 2 APPEARANCES: 3 DUANE MORRIS, LLP 4 Attorneys for Plaintiff 5 1540 Broadway 6 New York, New York 10036 7 BY: ANTHONY J. COSTANTINI, ESQ. 8 -and- 9 DUANE MORRIS, LLP 10 Attorneys for Plaintiff 11 470 Atlantic Avenue, Suite 500 12 Boston, MA 02110 13 BY: BEN KURUVILLA, ESQ. 14 15 BURNS & LEVINSON, LLP 16 Attorneys for Defendants 17 125 Summer Street 18 Boston, MA 02110 19 BY: ANDREW F. CAPLAN, ESQ. 20 21 ALSO PRESENT: PETRA KRAULEDAT, Ph.D. 22 PETER HANSEN, Ph.D. 23 24 25</p>
<p style="text-align: right;">Page 4</p> <p>1 H. Chow, Ph.D. 2 (Witness sworn.) 3 HERBERT CHOW, Ph.D., 4 called as a witness, having been first 5 duly sworn, was examined and testified 6 as follows: 7 EXAMINATION 8 BY MR. CAPLAN: 9 Q Good morning, Dr. Chow. 10 A Good morning. 11 Q I have introduced myself off the 12 record. On the record, I am Andrew Caplan and I 13 represent PointCare. 14 You know my clients, Petra Krauledat 15 and Peter Hansen? 16 A Yes. 17 Q Just to go over a few ground rules. 18 You can see we have a court reporter 19 taking down everything we say. If you could do 20 your best to please let me finish my questions 21 before you answer, that will save her from having 22 to type two people talking at once; and I will 23 likewise try to do my best to wait until your 24 answer is finished before I start to my question. 25 Fair enough?</p>	<p style="text-align: right;">Page 5</p> <p>1 H. Chow, Ph.D. 2 A Sure. 3 Q If you don't understand my question 4 or it doesn't make sense, let me know, and I will 5 try to ask a better question; otherwise, if you 6 answer the question, we will have to assume you 7 understood it and it make sense to you. 8 A Okay. 9 Q Have you ever been deposed before? 10 A No. 11 Q Have you ever served as an expert 12 witness, have you ever been retained as an expert 13 witness for a lawsuit? 14 A No. 15 Q Have you been retained as an expert 16 witness for this lawsuit? 17 A No. 18 Q Have you had any discussions with 19 Drew about the possibility of serving as an expert 20 witness? 21 A No. 22 Q Did you do anything to prepare for 23 this deposition? 24 A Have I done anything to prepare in 25 terms of reading documents? Do extra laboratory</p>

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1 H. Chow, Ph.D.
 2 **Q Did anyone participate by phone?**
 3 A No.
 4 Well, I guess Brian Damiano did show
 5 up in the beginning of the meeting, and then --
 6 for about ten minutes and then he left, and then
 7 Mr. Costantini shows up.
 8 **Q Okay. For at least part of the**
 9 **meeting, you reviewed the documents we have**
 10 **here --**
 11 A Correct.
 12 **Q -- in this three-ring binder?**
 13 A Correct.
 14 **Q Did you review any other documents**
 15 **yesterday?**
 16 A That's all the documents in front of
 17 you in the binder.
 18 **Q Okay. When you reviewed these**
 19 **exhibits, did they remind you of anything you had**
 20 **forgotten about?**
 21 A I don't think so. Mostly, mostly all
 22 of those are still in my recollection.
 23 **Q Fair enough.**
 24 **Did any folks from Drew participate**
 25 **either in person or on the telephone in**

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1 H. Chow, Ph.D.
 2 that?
 3 **Q I will follow-up, thanks.**
 4 **When were you -- strike that.**
 5 **The first matter, can we refer to**
 6 **that as DS 360?**
 7 A Sure.
 8 **Q When did you receive that engagement**
 9 **from Drew?**
 10 A Around August.
 11 **Q Of what year?**
 12 A August 2007. In fact, I started, I
 13 believe, the first week of September 2007 on that
 14 project. The discussion was in July, the actual
 15 work started in late August to early September.
 16 **Q Had you ever previously done any work**
 17 **for Drew?**
 18 A Yes. Previously, it was that second
 19 product that I was talking about. It was a due
 20 diligence project with immunodiagnostic product
 21 that Drew was interested in. I believe the
 22 company was in, was in Europe.
 23 So I, I was engaged to work on the
 24 due diligence of the company, marketing research.
 25 **Q And when did you receive that**

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1 H. Chow, Ph.D.
 2 yesterday's meeting?
 3 A No. At the end of the day, Mr. Frank
 4 Matuszak and I were to have a drink, and because
 5 he was -- he was close by. So, we had a drink,
 6 that was after the meeting.
 7 **Q Okay. Did you talk with him about**
 8 **the case at all?**
 9 A No. We talked about all the other
 10 business that I was involved with Drew at this
 11 time, but we didn't talk about the case at all.
 12 **Q Do you have ongoing business with**
 13 **Drew?**
 14 A Yes, yes. I have two other projects
 15 ongoing with Drew, and we mostly talk about that.
 16 **Q Okay. What are those on other two**
 17 **projects?**
 18 A One project has to do with the HPA1C,
 19 which I think the instrument, it's called DS 360.
 20 It's a -- it's A1C detection systems for diabetes
 21 monitoring, so that's business number one.
 22 Project number two has to do with
 23 some of the due diligence works I was requested
 24 by, by Drew on some other investment.
 25 Do you want me to be specific on

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1 H. Chow, Ph.D.
 2 engagement?
 3 A That must be about the same time,
 4 July time frame.
 5 **Q July 2007?**
 6 A July 2007.
 7 **Q Had you done any prior work for Drew?**
 8 A No, I don't believe so.
 9 **Q How did you first come in contact**
 10 **with Drew?**
 11 A In fact, I believe it was through
 12 conversation with Mr. Hansen, and through also one
 13 of our mutual friends, Dan O'Connor, who is one of
 14 my colleagues at Abbott.
 15 And I believe in the beginning of
 16 2007, in one of the conversation, because he knew
 17 that I was in -- I was independent consultant, and
 18 he -- he was telling me that Drew --
 19 **Q Which he now? I'm sorry.**
 20 A Mr. O'Connor.
 21 **Q Thank you.**
 22 A And he was suggesting that maybe I
 23 should contact Drew to get them interested to hire
 24 me as a consultant for different projects, and
 25 that was the start of the -- of my contact.

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1 H. Chow, Ph.D.

2 **Q And in your experience, if an FDA**
3 **auditor feels that the company is not in control**
4 **of the design because of a lack of certain design**
5 **history documents in the file, what are the**
6 **consequences?**

7 A Then you either have to go back and
8 redo it, or you are not -- well, the short answer
9 is you are not allowed to sell the product,
10 because at that phase, when they come in to
11 inspect, you are telling the FDA I am ready to
12 launch the product, and I have been through all
13 these design control steps and measures. And if
14 they come in and find that you are, you are very
15 relaxed in the design controls and you don't have
16 a lot of the key elements to show that you are in
17 control of design, then -- then you won't be able
18 to pass.

19 **Q So, if an FDA auditor is unsatisfied**
20 **with a document in a company's design history**
21 **file, the company will not be able to take their**
22 **product to market; correct?**

23 A Sometimes they will stop it,
24 sometimes they will say, continue to market it,
25 but correct these defects and I will inspect you

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1 H. Chow, Ph.D.

2 A I think it is in FDA guidelines that
3 each company should have -- it's actually a law,
4 it's not a guideline, that you have to have a
5 design control history file.

6 You are not looking to go into a
7 company and look at a binder that is called
8 "design history file." Design history file is a
9 collection of documents that you use to satisfy
10 the inspector that you are in control of the
11 entire design process. So, it's a set of binders.

12 **Q And those documents are required by**
13 **law?**

14 A Those documents, yes.

15 **Q And that is an important law to**
16 **medical device companies who need the FDA approval**
17 **to sell their products; correct?**

18 A Correct.

19 **Q And FDA auditors, do they call before**
20 **they show up for an audit?**

21 A Some do and some don't. The last two
22 times I was involved with it, actually they call.
23 We actually have appointment with them six months
24 ahead of time. And but, of course, they didn't
25 tell us exactly six months later on Tuesday or

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1 H. Chow, Ph.D.

2 again. And it really depends to severity of the
3 lax. If it's minor, they will come back in six
4 months, they will come back in one year, and if
5 you show the documents, then you correct the
6 problem, you are okay. But if the problem is
7 severe, they may ask you to stop. So, it really
8 depends on what problems you have.

9 **Q If the FDA auditors is unsatisfied**
10 **with the design history file, they have the**
11 **authority to tell the company they can't take**
12 **their product to market; correct?**

13 A There are incidents just like that.

14 **Q Have you ever experienced one?**

15 A Not personally.

16 **Q Are you aware of any at Drew?**

17 A I don't know of any incidents. I am
18 not following it, nor I have information. The
19 only the only familiar information I have is with
20 Abbott and Johnson & Johnson. So, I never
21 investigate this part of the Drew business.

22 **Q It's important to a company**
23 **developing a medical instrument to have a complete**
24 **design history file that will be satisfactory to**
25 **the FDA; correct?**

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1 H. Chow, Ph.D.

2 Thursday day, but, yeah, they give you short
3 notice when they are ready to come in.

4 **Q Do FDA auditors sometime show up**
5 **unannounced?**

6 A I heard that before, yeah.

7 **Q When the FDA auditors show up, they**
8 **expect the design file to be readily accessible to**
9 **them; is that correct?**

10 A Yes, they expect that.

11 **Q It's important for an FDA regulated**
12 **company to have an organized design history file;**
13 **correct?**

14 A I would say any products that have an
15 FDA approved, certified FDA approved FDA product,
16 I would be very surprised that that company
17 doesn't have a design history file for that
18 particular product. It's almost suicidal, I would
19 say.

20 **Q It will be suicidal not to have a**
21 **readily accessible design history file collection**
22 **of documents for an FDA regulated company;**
23 **correct?**

24 A Yes.

25 **Q The notion is if an FDA regulator --**

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1 H. Chow, Ph.D.
 2 talking about.
 3 **Q I should have asked you what you**
 4 **would say if you call me about it.**
 5 A That would be another two hours.
 6 **Q Are you familiar with the Becton**
 7 **Dickinson instrument or instruments that count**
 8 **CD4?**
 9 A I believe there is one, I believe
 10 there is a smaller piece of equipment. It's
 11 called FACS scan. I believe that it can do CD4
 12 count.
 13 **Q And are you familiar with the bigger**
 14 **Becton Dickinson instrument that does CD4 and**
 15 **other testing?**
 16 A I am more familiar with the large
 17 piece of equipment than the smaller one that is
 18 dedicated to CD4.
 19 **Q You are more familiar with the larger**
 20 **piece?**
 21 A Yes.
 22 **Q So, you know that, you know that**
 23 **Becton Dickinson's larger FDA-approved instrument**
 24 **tests CD4?**
 25 A Yes.

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1 H. Chow, Ph.D.
 2 **Q What is a predicate device?**
 3 A A predicate device in this instance
 4 ought to be another instrument that counts CD4
 5 with the intended use, with the same intended use.
 6 So, if I would give an example of the
 7 Becton Dickinson instruments, there are large
 8 pieces of equipment, likely those large pieces of
 9 equipment are not FDA approved. They are only
 10 approved for research use only. That piece of
 11 equipment cannot be used as a predicate device.
 12 The smaller instrument, if the
 13 intended use is to count CD4 for the management of
 14 AIDS patient, if that is the intended use cleared
 15 by FDA, then, yes, it will be, it can be used in
 16 this case to serve as predicate device.
 17 **Q Do you know whether Becton**
 18 **Dickinson's smaller CD4 counting device was FDA**
 19 **approved in mid November of '07?**
 20 A I never investigate, but I would
 21 probably, 80 percent certain that, yes.
 22 **Q So, you are 80 percent certain that**
 23 **Becton Dickinson had a small CD4 counting device**
 24 **that was FDA approved in November of '07?**
 25 A Correct.

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1 H. Chow, Ph.D.
 2 **Q And other stuff?**
 3 A Yes.
 4 **Q And Drew's HT was designed to test**
 5 **CD4?**
 6 A Only.
 7 **Q Only. And --**
 8 A Well, I shouldn't say that. Based on
 9 the spec, test CD4 and other parameters.
 10 **Q As well as hematology?**
 11 A Yes.
 12 **Q So, to serve as a predicate device,**
 13 **it's okay if an existing FDA-approved instrumen**
 14 **tests the same things as your instrument as well**
 15 **as some more, stuff; right?**
 16 MR. COSTANTINI: Is that a question?
 17 It was sounding more like a statement.
 18 MR. CAPLAN: Did you understand my
 19 question, sir?
 20 A Can you repeat?
 21 (Record read.)
 22 MR. COSTANTINI: The question is: Do
 23 you understand the question as stated or do
 24 you want him to restate it?
 25 A I think you need to restate it.

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1 H. Chow, Ph.D.
 2 **Q Are you 80 percent sure that Becton**
 3 **Dickinson's CD4 counting device was a reference**
 4 **instrument or could serve as a reference**
 5 **instrument for the Drew HT --**
 6 A Correct.
 7 **Q -- in mid-November of '07; correct?**
 8 A Yes. Correct.
 9 **Q Let me back up.**
 10 In mid-November of '07, when Matuszak
 11 and Nickols first raised with you a request for
 12 you to do some work regarding the Drew HT, what
 13 did they tell you about that?
 14 MR. COSTANTINI: You said Matuszak or
 15 Nickols. Do you mean Matuszak and Nickols?
 16 **Q What he said.**
 17 A I only spoke with one of them one at
 18 a time. I never have any instance in which I
 19 spoke with both of them at the same time.
 20 **Q Let me start again. Who at Drew**
 21 **first --**
 22 A Frank Matuszak.
 23 **Q What did he say to you about the HT?**
 24 A He told me that -- he never told me
 25 that there was -- there was a collaboration

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H. Chow, Ph.D.

A No. I assumed that when someone told me that, you know, there is a collaboration going on with another party, and the piece of equipment is about to ship to that party, I assume that it's a regular collaboration process for development purpose. So, for whatever purpose, I never follow up with that.

Q So, at least during the Matuszak conversation, you didn't know what point or what the partner was expected to do once it received the equipment?

A Correct.

Q What else did Mr. Matuszak tell you during that conversation?

A That was the extent. Nothing else.

Q And was anyone else part of that conversation?

A Not at the time, but when I -- when I start planning for the testing activity, I obviously have to talk to the engineers who is involved, and there was more information given to me afterwards, once I accepted the assignment.

Q Okay. Did Mr. Matuszak, what did Mr. Matuszak ask you to do?

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H. Chow, Ph.D.

A Asked me to independently verify the performance of the instrument based on, based on the system requirement specification.

And he did provide, I don't remember whether he send me -- I believe so, he send me the system specifications of the HT and he -- and he asked me specifically to design a set of tests that allow me to judge whether the HT instruments meet a subset of that specification.

Q Which specifications -- strike that. So, Mr. Matuszak asked you to test some but not all of the specifications?

A No. He gave me the entire specification, I believe the specification, well -- I just happened to flip it over here.

It's the annex one, it's --

Q So, you are in Exhibit 1, and just -- you are in Exhibit 1, tab 11; is that correct?

MR. COSTANTINI: Tab 11.

Q He gave you that document?

A I believe that is the set of requirements that was given to me, and I have to decide which requirements are important, which are not important, based on -- based on my judgment.

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H. Chow, Ph.D.

Q Did he give you any further guidance about which specifications to test beyond that?

A No. I will have to come up with that decision.

Q So, Drew left that to your sole discretion?

A Right.

Q Without any guidance?

A No guidance at all.

Q Do you something to add, sir?

A All I was told was the purpose of this piece of equipment. The intention of it is to count CD4, and being an expert in the field, the burden is on me to come up with the design elements to test whether this piece equipment will issue enough information for the software to calculate CD4 count or percentage.

So, based on that clue, I would then have to search through the specifications which items are important, which items are not important. And knowing that the stage of the prototype, where is it in. And, again, so we went through some of that in the morning.

I already know, by assumption, that

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the final software is not there, some of the algorithms may not be completely on board in the instrument.

So, based on those assumptions, you know, I have to pick and choose what is important.

Q So, those are all things you learned from talking to Mr. Matuszak at that meeting?

A Yes.

Q How long was your discussion with from Mr. Matuszak at that meeting about the HT?

A Most of the conversation I have with Mr. Matuszak is no more than ten minutes, no longer than 10 minutes.

Q So, his entire explanation of your mission on this project was no more than ten minutes?

A Actually, the entire conversation was this piece of instrument, the intended use is to count CD4 cells; that was it.

So, I, on my own, will have to come up with the key element, what needs to be tested, what is the design of the test plan, and it's all left with me.

Q I'm sorry, because I thought you said

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1 H. Chow, Ph.D.
2 to count the CD4 and the percent beyond saying it
3 was not quite finished?

4 A No.

5 Q What else did he tell you?

6 A That's it. And I -- and from that --
7 and then I asked him at what stage the instrument
8 was.

9 And he -- and he did at the time,
10 because I already signed on as a -- as a
11 consultant for the project, he did tell me that
12 the piece of equipment were to send to the
13 partners for further development of the CD4
14 algorithm.

15 Q Did he tell you anything else about
16 why Drew was shipping this equipment to its
17 partner?

18 A For development of the, for further
19 development of the CD4 algorithm.

20 Q That's it?

21 A Yes. I don't want to put words in
22 his mouth. It's kind of sounds to me like it's
23 ready for system integration, you know. I know
24 Drew handles the engineering portion at that time.
25 And from the conversation, I would extract that

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1 H. Chow, Ph.D.

2 Q That's what he said?

3 A Yes.

4 Q Can you explain why?

5 A No. In fact, most of the
6 conversation beyond the initial conversation, most
7 of the things we trading e-mail. And I believe
8 all the -- a lot of these e-mails are documented
9 in the book.

10 There weren't much elaboration
11 beyond, beyond what I told you on the instrument.
12 There were no explanation to me.

13 I assume that when my client --
14 virtually all my clients, when they come to me,
15 it's the sooner the better. So, I stopped asking
16 that question anymore.

17 Q I am familiar with that phenomenon.

18 A I assume everybody's contracts due
19 and want work done at the last minute, so it's a
20 given.

21 Q You understood that there was some
22 urgency to complete your project; correct?

23 A Yes. When they say "yesterday," it
24 means there is urgency to get it done.

25 Q At the time, were you still working

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1 H. Chow, Ph.D.

2 PointCare, or the partners, was to complete the
3 CD4 algorithm in the machine, and sending it to
4 the partners means to complete that portion of the
5 work.

6 And also to debug the entire system,
7 make sure that -- well, it's a normal course of
8 system integration and system debug, that type of
9 activities.

10 Q What else did Mr. Nickols tell you?

11 A That's the extent of what I remember
12 from the conversation.

13 Q Did he ask, what did he ask you to
14 do, if anything?

15 A He asked me to come up with a plan
16 what to do.

17 Q When was your -- when were these
18 conversations with Mr. Nickols?

19 A Must be towards the latter part of
20 November, I believe.

21 Q If I can back up for a second, when
22 you had your initial conversation with Mr.
23 Matuszak in mid-November, did he give you a time
24 frame for this assignment?

25 A The sooner the better.

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1 H. Chow, Ph.D.

2 on the other Drew instrument project, the DS360?

3 A Yes, yes.

4 Q And did you have any other work on
5 your plate?

6 MR. COSTANTINI: From Drew or
7 otherwise?

8 MR. CAPLAN: Anyplace.

9 MR. COSTANTINI: I just want to be
10 sure.

11 BY MR. CAPLAN:

12 Q Why don't we take it one at a time.

13 When Drew gave you the HT assignment,
14 did you have any other work from Drew beside the
15 360?

16 A Not besides the 360.

17 Q And did you have any work from any
18 other sources on your plate in mid-November of
19 '07?

20 A Yes, I did. I have about, at the
21 time, I had three other projects I was working on,
22 not from the same company. I believe it was two
23 or three companies.

24 Q Were those the typical type of
25 clients who all wanted their projects done the

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1 H. Chow, Ph.D.
 2 I did ask them what is the predicate
 3 device? And they told me they don't have one
 4 on-site.
 5 And I believe we talked about do we
 6 need to go out and get a laboratory to work with
 7 us so that we have at least some reference whether
 8 when we have a CD4 count, do we know whether the
 9 CD4 count is good or bad or lymphocyte counts.
 10 **Q** Who were you having these discussions
 11 with or communications with?
 12 **A** I believe at a time the e-mail was
 13 sent to a Steve -- William Ross and Gary Young.
 14 **Q** So, if I can back up, you were
 15 looking for a reference -- strike that.
 16 You were looking for a predicate
 17 device to use in your testing; correct?
 18 **A** Yes.
 19 **Q** And did you want a reference device,
 20 predicate device?
 21 **A** How would you know that your results
 22 is hitting the target without, without a
 23 reference?
 24 **Q** You can't know that without a
 25 reference device?

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1 H. Chow, Ph.D.
 2 **Q** Yes.
 3 **A** Going out to a lab. Usually, the
 4 labs are using the large piece of equipment, the
 5 cell sorters, that sort of thing, that may, may be
 6 able to give you a CD4 count, but not with the
 7 intended use similar to the kind of equipment the
 8 HT is designed for.
 9 So, even though they all give out the
 10 CD4 count, but the intent, the use -- intent is
 11 different.
 12 I could, I could -- I could give an
 13 example.
 14 **Q** Please.
 15 **A** A predicate device, it's a red apple
 16 compare toward a red apple. If I were to compare
 17 the red apple in this case, the HT with a
 18 laboratory flow cytometry equipment, which is not
 19 designed to the same intended use, I will be
 20 comparing the red apple to a green apple or maybe
 21 a tomato. So, it's different.
 22 At this stage, what matters is you
 23 compare with the predicate device for intended
 24 use, and so you make sure that you are comparing
 25 apple to apple and red apple to red apple.

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1 H. Chow, Ph.D.
 2 **A** No, you can't.
 3 **Q** That's why you wanted one to do your
 4 testing?
 5 **A** Yes.
 6 **Q** Drew didn't have one?
 7 **A** Drew did not have, did not have a
 8 predicate device that -- that can count CD4 with
 9 the intended use for AIDS patient management.
 10 **Q** And, so, then there was, you had
 11 communications or discussions with the folks at
 12 Drew about whether to avail yourselves of a
 13 predicate device from a lab; correct?
 14 **A** That was discussed, that was one of
 15 the options.
 16 **Q** Who said what about that?
 17 **A** Who said what about what?
 18 **Q** That is a lawyer way to ask what was
 19 the discussion?
 20 **MR. COSTANTINI:** What was the
 21 discussion about that particular option?
 22 **Q** So, the question on the table is:
 23 Drew doesn't have this predicate device that I
 24 would like here --
 25 **A** What is the second best option?

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1 H. Chow, Ph.D.
 2 And the key issue here is the HT is
 3 using a set of chemistry that is very unique to
 4 the partner, and at that time I think -- I know
 5 PointCare is the partner. So, at that point I
 6 think I know the set of reagents is very unique to
 7 PointCare.
 8 In the requirements, I have on two
 9 unknowns here. Having multiple unknowns is not a
 10 very good thing in scientific terms. If I want to
 11 prove that the instrument is correct, I want the
 12 instrument to be the single unknown. In this case
 13 I have two unknowns: The instrument is an unknown
 14 and the reagent is an unknown.
 15 So, when the test results come out
 16 not so good, is the reagent at fault or the
 17 instrument at fault?
 18 So, the first thing, if I have to
 19 design a test plan, someone skilled in the arts
 20 will say, "Let me eliminate one of these two."
 21 Being, being the hardware is in
 22 question here, the only thing I can eliminate is
 23 the chemistry set produced by PointCare, and the
 24 only instruments in the world that I know of that
 25 use the PointCare particle to count CD4 is the

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1 H. Chow, Ph.D.
 2 PointCare FDA approved equipment.
 3 So, logically, my assumption is, my
 4 first question to ask is: Do you have a predicate
 5 device; i.e., if I want to be more specific, do
 6 you have a PointCare class of instruments with the
 7 same intended use that can count CD4?
 8 I didn't know the exact brand name at
 9 the time. Now I know it's, what, NP? I just
 10 learned that yesterday.
 11 But at a time I didn't know. I
 12 asked. So what is the apple to, red apple to red
 13 apple comparison.
 14 They told me they don't have one
 15 on-site. They used to have one, but they sent it
 16 back to the partner, and they didn't have one.
 17 So, that is why the conversation drifted to, well,
 18 maybe we should get a -- get a reference lab or
 19 get an outside laboratory to do are comparisons.
 20 But the decision was it's a red apple to green
 21 apple comparison. They are not using the same
 22 PointCare reagents.
 23 So, at the end, if there is a
 24 mismatch in the data, I don't know whether it's
 25 the reagent is different or whether it is the

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1 H. Chow, Ph.D.
 2 **Q Right. Let's start again.**
 3 **When you did your testing at Drew,**
 4 **did you want to -- strike that.**
 5 **When you did your HT testing for**
 6 **Drew, did you want to have a predicate device?**
 7 **A Do you have something you want to**
 8 **say? No.**
 9 **I'm sorry was distracted by his --**
 10 **MR. COSTANTINI: I was going to ask**
 11 **for an interruption while we figured out**
 12 **what the noise was, because it was afraid it**
 13 **was going to interfere with the question or**
 14 **answer. Apparently, it's given up by**
 15 **itself, it was a musical introduction to**
 16 **your question, which do you want him to**
 17 **repeat it?**
 18 **THE WITNESS: Please.**
 19 **BY MR. CAPLAN:**
 20 **Q To make sure we are on the same page,**
 21 **when you were doing, when you were testing Drew's**
 22 **HT, you wanted to have a predicate device to use**
 23 **in your testing; correct?**
 24 **A Correct.**
 25 **Q And you wanted a predicate device in**

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1 H. Chow, Ph.D.
 2 instrument is different, so, I cannot achieve my
 3 objective.
 4 So, we decided -- we decided we are
 5 going to stay with what we have.
 6 **Q So, at the time your expert**
 7 **conclusion was that there is not, there is no**
 8 **reference device in the world for the HT, other**
 9 **than the NP?**
 10 **A No. There was no equipment available**
 11 **at Drew. I knew, I knew at the time that there**
 12 **was equipment based on, based on the flier that I**
 13 **got from Mr. O'Connor, that the instrument exists,**
 14 **but I didn't know the name of the instrument, but**
 15 **that instrument or the equivalent instrument is**
 16 **not available at Drew.**
 17 **Q When you were doing your HT testing**
 18 **for Drew, you wanted to have a predicate device;**
 19 **right?**
 20 **A It would be best if I have, if I have**
 21 **a reference.**
 22 **Q Because you can't do accuracy testing**
 23 **without a reference device; right?**
 24 **A I cannot do accuracy testing without**
 25 **the predicate device.**

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1 H. Chow, Ph.D.
 2 **order to do precision testing; correct?**
 3 **A I want a predicate device to do**
 4 **precision the testing and the equipment will be**
 5 **best if it used the same particles or the same**
 6 **beads that is produced by PointCare.**
 7 **Q We will do better if we take just one**
 8 **question at a time.**
 9 **A Okay.**
 10 **Q You wanted a predicate device in**
 11 **order to do precision testing of the HT**
 12 **instrument; correct?**
 13 **A Correct.**
 14 **Q Without a predicate device, you could**
 15 **not do precision testing of the HT device;**
 16 **correct?**
 17 **A I can do precision testing, but I**
 18 **cannot do accuracy testing.**
 19 **Q So, you wanted a predicate device in**
 20 **order to do accuracy testing of the HT?**
 21 **A Correct.**
 22 **Q Without a predicate device, you could**
 23 **not do accuracy testing of the HT; correct?**
 24 **A Correct.**
 25 **Q First you asked Drew if they had a**

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1 H. Chow, Ph.D.

2 for your testing?

3 A I told them it's important to have a
4 reference instrument that used the same PointCare
5 reagent.

6 Q Does the Becton Dickinson instrument
7 use the same PointCare reagent?

8 A No.

9 Q So, in your view, that is not a
10 reference instrument; right?

11 A It's not a reference -- well, you
12 could, by FDA guidelines, you could use it as an
13 FDA predicate device, but at this stage of the
14 development, it's a red apple to green apple
15 comparison.

16 Q So, at that time, you could have used
17 as a reference instrument, an instrument that did
18 not use PointCare's reagent; correct?

19 A I couldn't.

20 Q You could not?

21 A I won't, because I will have two
22 variables. My job is to eliminate -- I don't want
23 to have two variables, because if the data doesn't
24 come out right, is the instrument ready or is the
25 reagent not ready or is the software?

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1 H. Chow, Ph.D.

2 they were aware of any company selling a predicate
3 device for CD4 testing that used PointCare's assay
4 that you could use a predicate device in your work
5 for Drew?

6 A I didn't ask specifically the
7 predicate device, but I did ask in general, are
8 there other reference instruments that we can use?
9 So, in that case, I am giving an even more general
10 term. Do we have available in this class of CD4
11 count instruments. I don't care whether it's a
12 flow cytometry, for laboratory research use or for
13 clinically approved product, do we have anything
14 in the Dallas area that we can use. So, I would
15 assume that it implies, whether it's predicate
16 device or not predicate device, do we have
17 anything available.

18 Q And what, what was the answer you got
19 to that question from Drew?

20 A There are laboratories around in the
21 Dallas area laboratory area that can, if they can
22 participate, we can send the flood blood to, and
23 they can give us a CD4 count or whatever
24 information we ask for. There are laboratories
25 that can provide you with that.

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1 H. Chow, Ph.D.

2 I don't want to have all these
3 variables. I want to have an instrument as a
4 comparison that use common PointCare reagent, so
5 that is my only option.

6 Q Okay. Did you do anything to
7 investigate whether PointCare had a commercially
8 available --

9 A No.

10 Q -- commercially available FDA product
11 on the market that ran its reagent that you could
12 have used as a reference instrument?

13 A No, I didn't. I left it with Drew
14 because if any -- because they are developing this
15 kind of equipment. If they know someone, some
16 competitors has it elsewhere, using other
17 predicate device, they would come up with the
18 suggestion, so --

19 Q Did you even ask the folks at Drew
20 whether they were aware of any predicate device
21 that ran --

22 A In general --

23 Q If I could finish my question.

24 A Sorry.

25 Q Did you ask anyone at Drew whether

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1 H. Chow, Ph.D.

2 Q Why were those laboratories not used
3 for your work?

4 A Because, again, unless they are using
5 the PointCare particles in the CD4 count, then it
6 is not a good comparison for what I have to
7 accomplish.

8 Q Who made that decision?

9 A Me.

10 Q Have you ever heard of PointCare's
11 AuRICA instrument?

12 A Yes. I believe that was in the flier
13 that Mr. O'Connor sent me.

14 Q Do you know whether, in fact, the
15 AuRICA was an FDA-approved instrument for CD4
16 testing that used PointCare's reagent?

17 A I think now I know that it is FDA
18 approved, but at the time I did not.

19 Q Did investigate that at the time?

20 A No.

21 Q So, what instrument would Drew use as
22 a predicate device to gain FDA approval for the
23 HT?

24 A We didn't have a predicate device.

25 Q There was none?

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1 H. Chow, Ph.D.

2 with some questions.

3 Q Tab 37, is that an e-mail you
4 received from Ken Pina on December 12?

5 A It has my name on it.

6 Q Did you receive it?

7 A Yes.

8 Q Here is a draft letter. Please note
9 the highlighted section?

10 A Yes.

11 Q Tab 38, is that the attachment you
12 received with the e-mail on tab 37.

13 A It looks like it is.

14 MR. COSTANTINI: I will say that it
15 is our supposition that it is when we put
16 this together for Mr. Chow. He is the only
17 one that can tell you for sure.

18 A Without the attachment directly
19 attached to the e-mails, I cannot be sure whether
20 this is word for word the exact document, but I
21 have seen the highlighted sections on this page.

22 Q Did someone ask you to comment on --

23 A No. Didn't ask me to comment, just
24 make sure that I have no objection to it.

25 Q What did you say about that?

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1 H. Chow, Ph.D.

2 assignment is to make sure whether the instrument
3 is in a state that you can ship it back to the
4 partner; that was my assignment.

5 So, to what extent the business
6 agreement between two parties really has nothing
7 to do with my -- what I set out to do.

8 Q So, it was not your task to
9 familiarize yourself with the parties' various
10 obligations --

11 A No.

12 Q -- under the agreement; right?

13 A No.

14 Q Did you ever receive a full copy of
15 the contract?

16 A Beyond, beyond the initial e-mail,
17 whatever attached e-mails, no, I did not have the
18 final copy.

19 Q I may not have been clear.

20 The contract between Drew and
21 PointCare, we have seen certain annexes. Did you
22 ever get the whole enchilada?

23 A No.

24 Q So, when this sentence that we are
25 looking at in tab 38, says PointCare -- I'm sorry.

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1 H. Chow, Ph.D.

2 A I don't see anything that is
3 incorrect.

4 Q So, this highlighted paragraph that
5 says, "Drew has now progressed the project to the
6 point where it's now necessary for PointCare to
7 carry out its responsibility and make certain that
8 it's CD4Sure leukocyte enumeration assay will be
9 compatible with and operate with Drew's HTC and
10 HTW diagnostic instrument platforms."

11 Did you know what PointCare's
12 responsibilities were in that regard?

13 A From the previous communications with
14 annex one, there were timelines and there were
15 division of labors between the two companies, who
16 is doing what. In that regard, I have a glimpse
17 of what PointCare ought to do and what Drew signed
18 up to do.

19 Q Do you consider yourself, do you
20 understand -- have you made a study of the
21 parties' respective obligations under their
22 agreement?

23 A I received it and I look at it, and
24 whether I need to know -- do I -- I don't -- I
25 don't expect that I need to know, because my

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1 H. Chow, Ph.D.

2 Start again.

3 Tab 238 says Drew has now progressed
4 the project to point where it is now necessary for
5 PointCare to carry out its responsibilities, so
6 forth and so on.

7 What point in the project did Drew
8 have to get to where PointCare's responsibilities
9 described here kicked in?

10 A If we go back to the CD4 count,
11 apparently that is the objective of instruments,
12 if Drew is signed up to do the hardware to make
13 sure that the white cell count is correct, the
14 lymphocyte count is correct, and PointCare is
15 working on the CD4 software, then as long as the
16 total white count and lymphocyte counts, they are
17 okay, then that is the point that can go back to
18 PointCare for further development.

19 Q And do you say that based upon an
20 understanding of what the contract between parties
21 require?

22 A No. It's based upon what the initial
23 goal that is set out for me to test instruments
24 and where I have to take the -- take my report to.
25 Those are the two key elements that I derive from

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1 H. Chow, Ph.D.

2 all the information that I have.

3 **Q So, your opinion that the HT**
4 **instrument was ready to deliver to Drew was based**
5 **upon your analysis of criteria and information**
6 **that Drew gave you and not the requirements of the**
7 **contract?**

8 A No, no.

9 **Q That is a wrong statement.**

10 A No. It's not based on, it's based on
11 my understanding of the specifications and what's
12 required to give a CD4 count, and the train of
13 events that has to go into it, and that's purely,
14 that is my -- my thought process.

15 **Q That is purely the basis of your**
16 **opinion that the HT was ready to deliver to**
17 **PointCare?**

18 A Right.

19 **Q And your opinion that the HT was**
20 **ready for delivery to PointCare is not based upon**
21 **the contract between the parties; right?**

22 A No. No.

23 **Q Do you know whether or not prior to**
24 **your test it had already been determined that**
25 **PointCare's assay was compatible with and operated**

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1 H. Chow, Ph.D.

2 could do it, doesn't mean that it's done.

3 A First of all, I have never seen any
4 data prior to my involvement on the project, and
5 never looked at the prior data to see whether, at
6 what state the PointCare assays work on the
7 instrument. So, I have no knowledge on any prior
8 attempt.

9 And I guess at this point, if you --
10 just purely based on my data, that the CD4 count
11 as we went through it at length, it was okay. The
12 software built into the HT instruments, it looks
13 okay, except on the critical point at the low end
14 of the CD4 count, they need some work.

15 **Q The software needed some work, you**
16 **say?**

17 A Right.

18 **Q Not the assay necessarily?**

19 A That is the assay.

20 **Q The software is the assay?**

21 A No. I assume it's not the chemistry
22 at fault. I assume that it's the software is not
23 quite ready. Now, it could be there is more work
24 to be done with the PointCare particles assay, I
25 don't know, and not until I compare with other

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1 H. Chow, Ph.D.

2 **with Drew's HT platforms?**

3 A I would assume if it was in effect,
4 then why would both companies work on the project?
5 I would assume by working together, it's already,
6 it's already pre-determined that the PointCare
7 assay could and would work on HT platform.
8 Someone must have determined that before, before
9 they jointly embarked on this project.

10 **Q So, you assume that before they even**
11 **started the project, it was already determined**
12 **that PointCare's assay would work on the HT**
13 **platform?**

14 A Someone must have done some work on
15 it, yeah.

16 **Q So, if it was already known that**
17 **PointCare's assay worked with -- worked on the HT**
18 **platform, then what remained for PointCare to do**
19 **in terms of carrying out its responsibility to**
20 **make sure that its assay was compatible with the**
21 **platform if that was already established?**

22 MR. COSTANTINI: Is this a trick
23 question?

24 MR. CAPLAN: No.

25 MR. COSTANTINI: Just because you

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1 H. Chow, Ph.D.

2 instruments I won't come to that conclusion.

3 **Q An assay is another word for a**
4 **chemical reagent, right?**

5 A Correct.

6 **Q That is something totally different**
7 **than software?**

8 A Correct.

9 **Q So, when you did your work, you had**
10 **no information one way or the other whether or not**
11 **it had already been determined that PointCare's**
12 **assay worked on the HT platform; right?**

13 A No, not prior to my testing exercise
14 at Drew. In fact, the testing result pointed
15 towards that the PointCare assay is probably
16 working, because I use the same particles all
17 throughout the test.

18 And apparently, the precision,
19 precision seems to be okay. It's the -- well,
20 precision seems to be okay for the hematology
21 portions and so that doesn't interfere. If I
22 would have guessed, I would probably say the
23 chemistry, it's -- it's not a place where I would
24 want to see improvement. I would first tackle the
25 software.

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1 H. Chow, Ph.D.
 2 is responsible for system integration. I was
 3 under the impression that the software would be
 4 responsible by PointCare and someone will be
 5 taking the entire system and go run these clinical
 6 or laboratory tests.
 7 **Q And your — you have a lot of**
 8 **experience in system integration in your career;**
 9 **right?**
 10 A Yes.
 11 **Q You are an expert in that?**
 12 A I have done many system integration
 13 in many systems.
 14 **Q Do you consider yourselves to be very**
 15 **familiar with the HT instrument based on your**
 16 **testing?**
 17 A Yes.
 18 **Q So, in your expert opinion, how much**
 19 **time would you have expected it to take in order**
 20 **to do system integration on this instrument?**
 21 A Based on the data we have seen today,
 22 the CT4 counts, it's very close to the target and
 23 they need refinement. So, the thing that you need
 24 to do is collect N equal to 80 from a real clinic,
 25 from real patient, and refine that algorithm, and

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1 H. Chow, Ph.D.
 2 trials?
 3 A Yes.
 4 **Q In your experience, what happens, is**
 5 **it unusual to have hiccups in this phase?**
 6 A You know, there are two ways to look
 7 at it. If the data comes out wishy washy, I have
 8 some numbers come out high, some low, I would say,
 9 you are not quite there. It seems like it is
 10 giving me some random number.
 11 Even though the end number is small,
 12 but the trend is pretty clear. You are giving
 13 some genuine CD4 numbers, even though it's off
 14 peak a little bit. It's just fine adjustment. It
 15 wasn't for that two days we ran, I don't know how
 16 many runs, many runs, continuously without human
 17 intervention, and it was running very smooth.
 18 There was no hiccup. So, to me the hardware, it's
 19 running okay. The software, the firmware that is
 20 driving the hardware, the motors and all that, is
 21 not running jaggedly, it's running pretty smooth.
 22 So, to me you are at the end stage of system
 23 integration rather than the beginning stage of the
 24 system integration; nevertheless, system
 25 integration, refinement of the software or maybe

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1 H. Chow, Ph.D.
 2 maybe refine the chemistry, and if there is
 3 anything to correct on the instruments, correct
 4 it.
 5 So, the system integration, if I
 6 didn't have chance that day to run the instrument
 7 myself, and understand that now I can put the
 8 blood in, and the banana comes out and banana
 9 looked yellow and the peel is okay, I won't make
 10 that statement. It seems like now it comes out a
 11 banana, but it is squashed a little bit. So we
 12 can make it a little bit pretty. The only way to
 13 do it is to go out to a real laboratory and run
 14 more data and refine it. It's not really have to
 15 start from scratch to do it.
 16 **Q My question is how long?**
 17 A Not until the system integrations
 18 continue. Unless you have, you don't have --
 19 assuming that you have no more hiccup, all this is
 20 refinement of software, you may get lucky in a few
 21 months that you can get to where you are, that you
 22 can go start the clinical.
 23 **Q So, if you got lucky, you didn't have**
 24 **hiccups, you didn't have software problems, best**
 25 **case scenario a few months more to go to clinical**

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1 H. Chow, Ph.D.
 2 chemistry, it's the task.
 3 MR. COSTANTINI: Let me just tell you
 4 that Mr. Chow's car is here to take him to
 5 the airport. So, if you could do some wind
 6 up questions --
 7 MR. CAPLAN: I'm on the home stretch
 8 here.
 9 MR. COSTANTINI: I would hope.
 10 BY MR. CAPLAN:
 11 **Q So, you say best case scenario with**
 12 **no hiccup, system integration was two to three**
 13 **more months of work; right?**
 14 A Yes.
 15 **Q What, if we don't have best case**
 16 **scenario, what amount of time would we be looking**
 17 **for system integration on this project?**
 18 A I can't give you a guess.
 19 **Q Do you have a best estimate?**
 20 A No.
 21 **Q If Drew asked you to form a judgment**
 22 **as a consultant and said, you know, Dr. Chow, how**
 23 **much longer are we looking at here.**
 24 A To me, the system is running pretty
 25 smooth. I mean, I -- if you look at the error

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1 H. Chow, Ph.D.
 2 coming out of the report, there are not that many
 3 errors. So, to me the system the, you are at the
 4 tail end of the system integration.
 5 **Q Two to three months more?**
 6 A Yeah.
 7 **Q What come after system integration?**
 8 A Then you are ready to do clinical
 9 study, to collect FDA study, which means you go
 10 to --
 11 **Q I don't need what remains, just what**
 12 **comes next?**
 13 A Clinical.
 14 **Q In your experience, how long would**
 15 **you have expected clinical studies to take on this**
 16 **instrument?**
 17 A Clinicals, if go to sites that have
 18 high traffic AIDS patients, three sites are not
 19 that hard to find in the United States or
 20 elsewhere, I would say one-and-a-half, two months
 21 you can collect all the data, and take another
 22 half a month to reduce the data and put in the
 23 report and submit it to FDA.
 24 **Q So that's, is there anything else to**
 25 **clinical studies?**

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1 H. Chow, Ph.D.
 2 in a month-and-a-half to two months.
 3 **Q Plus then you said another half a**
 4 **month to reduce it?**
 5 A Right.
 6 **Q And then sometime to dicker about a**
 7 **contract.**
 8 A No, I said dicker about a contract
 9 now.
 10 **Q That was up front?**
 11 A Up front. You can do it now.
 12 **Q How long is the contract haggling?**
 13 A It depends on the site. To do
 14 investigational review board, they only meet once
 15 a week for these universities, give it two months.
 16 If you start now, knowing that one-and-a-half
 17 months or two months later the software will be
 18 done, and then you can go, go ahead and run the
 19 clinical.
 20 **Q So, that's clinical studies, two**
 21 **months on the contract and about two months for**
 22 **actual work, about four months total for clinical**
 23 **studies?**
 24 A Yes.
 25 **Q What is the next step?**

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1 H. Chow, Ph.D.
 2 A Sign a contract with the sites to
 3 make sure that they agree on the payments. That
 4 will probably take more time than actually running
 5 the clinical. They laughing, so they agree with
 6 me.
 7 **Q When you include the agony of the**
 8 **signing the contract, and then the one-and-a-half**
 9 **to two months?**
 10 A Yeah.
 11 **Q And then a half month, how long would**
 12 **you have expected clinical to take on this**
 13 **project?**
 14 A I would say two months if you are
 15 really pushing it. So, if you go a high
 16 traffic --
 17 **Q Well, I'm asking for the rapid, best**
 18 **case scenario, I'm asking for your expert opinion**
 19 **about the likely amount of time this project would**
 20 **have taken.**
 21 A Given that you have to test in high
 22 traffic laboratories, it should go very rapid. If
 23 you go to 150 per laboratory would probably, times
 24 three sites, you can do it in parallel, so, 150
 25 samples, in high traffic laboratory, you can do it

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1 H. Chow, Ph.D.
 2 A Reduce that whole body of data, write
 3 it up, submit to FDA.
 4 **Q How long does that take in your**
 5 **expert experience?**
 6 A Usually, with the 510(k) studies, I
 7 think the ongoing cycle is 45 to 90 days, depends
 8 if FDA has a question.
 9 **Q After you submit to FDA?**
 10 A After you submit it to FDA.
 11 **Q I thought there was a step about**
 12 **pulling your materials together and making a**
 13 **submission.**
 14 A Those are efforts based. So, if you
 15 put two or three clinical coordinators together,
 16 you can generate a report fast.
 17 **Q Can you do that before the clinical**
 18 **studies are over?**
 19 A You can have all the forms done,
 20 write up done, have pre-conclusions and then pluck
 21 in the data to support whatever the preconceived
 22 idea you have, you can do that.
 23 **Q You have to do some work on your**
 24 **510(k) submission after your clinical studies are**
 25 **done?**

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1 H. Chow, Ph.D.
 2 A You can start writing the package now
 3 and pluck in the data when you have the data.
 4 Q You have to spend on clinical studies
 5 are done working on your 510 submission?
 6 A Right.
 7 Q In your expert experience, how would
 8 that take?
 9 A Writing or submitting.
 10 Q Putting the materials together, FDA,
 11 here it is.
 12 A Two, three weeks at the most.
 13 Q Then you submit to it the FDA, how
 14 long does that normally take until the FDA gives a
 15 blessing?
 16 A If there is no question, I think it's
 17 45 days. 45 days? Ninety days.
 18 If they have questions, they will
 19 come back and then the clock starts again, the
 20 90-day clock starts again.
 21 Q Is it rare in your experience for the
 22 FDA to have questions about a 510(k) submission?
 23 A If it's a PMA, yes. 510(k) these
 24 days the FDA is very accommodative. Especially,
 25 this kind of program is needed in the world, they

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1 H. Chow, Ph.D.
 2 data packet. So, the total duration from the time
 3 you start clinical to finish the package, ready to
 4 send, it will be three months to four months.
 5 Q But there was, you said you would
 6 expect about two months to haggle out to contracts
 7 with the labs, right.
 8 A You can do it if you start early,
 9 that is in parallel with the software development.
 10 Q So, in your experience, you would
 11 expect that to be completely over with, contract
 12 signed --
 13 A By the time the software is done.
 14 Q So, in your expert opinion, you would
 15 expect two to three months for system integration
 16 and then another two months or so for clinical
 17 studies before a 510(k) could be submitted?

18
 19 (Continued on next page to include jurat)
 20
 21
 22
 23
 24
 25

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1 H. Chow, Ph.D.
 2 would probably expedite it.
 3 Q Assuming you get lucky and no
 4 questions from the FDA and FDA gives its approval,
 5 what happens next?
 6 A When they give you the approval, you
 7 can go right ahead and sell it. In fact, you
 8 don't have to wait until FDA approval. You can
 9 market this as a research use only as a presale
 10 strategy and many companies doing the same thing.
 11 Q So, to wrap up, from the point at
 12 which you concluded the HT was ready to be sent to
 13 PointCare, until the instrument would have been
 14 ready for FDA approval, in your expert opinion you
 15 would have expected there to be approximately two
 16 to three months of system integration work, a
 17 further four months for clinical studies,
 18 including the studies and the contract haggling?
 19 A Two to four months.
 20 Q Two to four months, and then two to
 21 three more weeks to put together your 510(k)?
 22 A I think that is already included at
 23 two to four months. I thought I said collecting
 24 the data would probably take two months, and then
 25 let's say you take another month to reduce the

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1 H. Chow, Ph.D.
 2 A Correct.
 3
 4 (Deposition concluded.)
 5
 6 I, HERBERT CHOW, Ph.D., the witness
 7 herein, do hereby certify that the foregoing
 8 testimony of the pages of this deposition to be a
 9 true and correct transcript, subject to the
 10 corrections, if any, shown on the attached page.
 11

12 H. Chow, Ph.D.
 13 Subscribed and sworn to before me this
 14 _____ day of _____, _____.
 15

16 NOTARY PUBLIC
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 25

Rubicon Consulting

CONFIDENTIAL

July 20, 2007

Via electronic mail to Mr. Richard J. DePiano at rdepiano@escalonmed.com

Richard J. DePiano
Escalon Medical Corp.
Chairman and CEO
565 East Swedesford Road, Suite 200
Wayne, PA 19087

RE: Letter of Engagement

Dear Mr. DePiano:

Good business practice requires my firm, Rubicon Consulting, to inform clients in writing of my services, billing practices, and fees. This letter is to furnish you with a written memorandum of the basis upon which you have engaged our service.

By way of introduction, Rubicon Consulting is a business and technology consulting firm specializing in medical devices, biotechnology, and therapeutic products. Specialties include: strategic planning, technical due diligence, technology assessment, business and product development, technology transfer from pilot plant to manufacturing, Quality and Regulatory issues related to Design Control.

It is somewhat difficult to predict, with any reasonable degree of accuracy, the nature and full extent of services to be performed on your behalf. Once we have agreed on certain project(s), we would amend this document and attach a Work Statement executed by both parties.

You agree to pay for all authorized services at the rates then in effect. Our current rate is charged at \$125 per hour (General Manager). We find that certain tasks can be economically performed by my associates (writing of documentations, specifications, protocols etc.) at a reduced rate of \$100 per hour. If a task may be more cost effective by delegating it to other members, I will seek your approval prior to such delegation. All authorized travel expenses will be reimbursed with in transit travel time charged at \$40 per hour. Client will receive our invoicing for services via email once by month, on the fifteenth. Payment for invoices is due 30 days after the date of the invoice.

P.1 of 1.

Rubicon Consulting

You may discharge us at any time, with or without any reason. Additionally, we may withdraw for reasons which include breach of the Agreement by your firm, your refusal to follow our advice in a material matter, or the occurrence of any fact or circumstance that would render our continuing representation of you unlawful, unethical, or otherwise inappropriate in our judgment. We both agree to sign documents reasonably necessary to effect or complete our discharge or withdrawal.

Please note that we already have a signed Mutual Nondisclosure Agreement in place.

Lastly, it is our understanding that you or your designated alternate, are the Administrative Representative with the authority to administer the matters of this letter in all its aspects. In this capacity, you are authorized to receive and approve invoices, and to sign and receive all correspondence.

Thank you. We look forward to working with you and representing your interests.

Yours truly,



Herbert Chow, Ph.D.
General Manager
Rubicon Consulting
PO Box 503915
San Diego,
CA 92150-3915
858-229-7407
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Skype: Herbert.chow

P. 2 of 2

Exhibit C

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
DREW SCIENTIFIC, INC.,

4
Plaintiff,

5
-against- Case No. 08 CV 1490-AKH

6
POINTCARE TECHNOLOGIES, INC.,

7
Defendants.

8 -----X
9
10
11 DEPOSITION OF RICHARD J. DePIANO
12 New York, New York
13 Wednesday, April 2, 2008
14
15

16 *CONFIDENTIAL PORTIONS - ATTORNEYS' EYES ONLY*
17 PAGES 89-91
18

19 Reported by:
20 Angela M. Shaw-Crockett, CSR, RPR
21 Job No. 15877
22
23
24
25

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8 April 2, 2008</p> <p>9 9:36 a.m.</p> <p>10</p> <p>11</p> <p>12 DEPOSITION of RICHARD J. DePIANO, taken by</p> <p>13 the Defendants, held at the offices of</p> <p>14 Duane Morris, LLP, 1540 Broadway,</p> <p>15 New York, New York, before Angela M.</p> <p>16 Shaw-Crockett, a Certified Shorthand Reporter,</p> <p>17 Registered Professional Reporter and Notary Public</p> <p>18 of the State of New York and New Jersey.</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 3</p> <p>1</p> <p>2 APPEARANCES:</p> <p>3</p> <p>4 DUANE MORRIS, LLP</p> <p>5 Attorneys for the Plaintiff</p> <p>6 1540 Broadway</p> <p>7 New York, New York 10036</p> <p>8 BY: ANTHONY J. COSTANTINI, ESQ.</p> <p>9 BRIAN J. DAMIANO, ESQ.</p> <p>10</p> <p>11 BURNS & LEVINSON LLP</p> <p>12 Attorneys for the Defendants</p> <p>13 125 Summer street</p> <p>14 Boston, Massachusetts 02110</p> <p>15 BY: ANDREW F. CAPLAN, ESQ.</p> <p>16</p> <p>17 ALSO PRESENT: Petra Krauledat</p> <p>18 Frank Matuszak, Drew Scientific</p> <p>19 ** ** *</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 4</p> <p>1</p> <p>2 STIPULATIONS</p> <p>3 IT IS HEREBY STIPULATED AND AGREED</p> <p>4 by and between counsel for the respective parties</p> <p>5 hereto that all rights provided by the C.P.L.R.,</p> <p>6 including the right to object to any question,</p> <p>7 except as to form, or to move to strike any</p> <p>8 testimony at this examination, are reserved; and, in</p> <p>9 addition, the failure to object to any question or</p> <p>10 to move to strike any testimony at this examination</p> <p>11 shall not be a bar or waiver to make such motion at,</p> <p>12 and is reserved for, the trial of this action;</p> <p>13 IT IS FURTHER STIPULATED AND</p> <p>14 AGREED that this examination may be signed and sworn</p> <p>15 to, by the witness being examined, before a notary</p> <p>16 public other than the notary public before whom the</p> <p>17 examination was begun, but the failure to do so, or</p> <p>18 to return the original of this examination to</p> <p>19 counsel, shall not be deemed a waiver of the rights</p> <p>20 provided by Rules 3116 and 3117 of the C.P.L.R., and</p> <p>21 shall be controlled thereby.</p> <p>22 IT IS FURTHER STIPULATED and</p> <p>23 agreed that the filing of the original of this</p> <p>24 examination shall be and the same hereby waived.</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1</p> <p>2 RICHARD J. DePIANO,</p> <p>3 called as a witness, having been first duly sworn,</p> <p>4 was examined and testified as follows:</p> <p>5 Business address: 565 East Swedesford Road,</p> <p>6 Wayne, Pennsylvania 19087.</p> <p>7 EXAMINATION BY</p> <p>8 MR. CAPLAN:</p> <p>9 Q. Good morning, sir.</p> <p>10 A. Good morning.</p> <p>11 Q. If you could just state your name for the</p> <p>12 record, please, and spell your last name.</p> <p>13 A. Richard J. DePiano, spelled D-E capital</p> <p>14 P-I-A-N-O.</p> <p>15 Q. What do you do for a living?</p> <p>16 A. Sometimes I run Escalon Medical Corp. I'm</p> <p>17 the chairman and CEO of that company.</p> <p>18 Q. Have you been deposed before?</p> <p>19 A. Yes.</p> <p>20 Q. How many times?</p> <p>21 A. I don't know the exact number, but more</p> <p>22 than ten.</p> <p>23 Q. What's your best estimate of how many</p> <p>24 times you've been deposed?</p> <p>25 A. 20, 30 times over my career.</p>

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1 R. DePIANO - 4/2/08

2 Q. And that was Escalon's concern about the
3 fact that all of Drew's products except the 2280
4 weren't dated?

5 A. Yes. We knew that when we went in there
6 that we would have to -- it was very similar to
7 another company we acquired, and we were successful
8 in doing that, so we thought we could be successful
9 doing this.

10 Q. And the fact that all but the 2280 were
11 dated, was that also a concern to Escalon in terms
12 of the ability to find customers interested in
13 buying the dated products?

14 A. The marketing of those products becomes
15 difficult versus you had brand new products and more
16 bells and whistles were -- you know, more features.

17 Q. It probably doesn't take a lifetime in
18 sales to say that if one is selling a dated product
19 and one's competitors are selling current products,
20 one is at a competitor disadvantage. Fair enough?

21 A. Fair enough.

22 Q. And that was the situation that Escalon
23 found itself in relative to the Drew product
24 portfolio, with the exception of the 2280?

25 A. I think when we acquired the company, that

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1 R. DePIANO - 4/2/08

2 portion of our Q and A, I asked you to explain to me
3 Escalon's plan to update Drew's product offerings
4 and to expand them. And you've described to me that
5 there was an obsolescence or a dating challenge.

6 Was there more to -- what was the plan --
7 what was Escalon's plan to deal with that issue?

8 A. Well, I was made aware of the fact that we
9 were solely a hematology company at the time we made
10 the acquisition. Then subsequent to the
11 acquisition, and bringing on new personnel, we
12 wanted to expand to be a one-stop shopping, to the
13 extent we could be, so we looked to add lines which
14 we didn't carry, such as a chemistry line.

15 Q. When you say "we," are you referring to
16 Drew at this point?

17 A. Drew.

18 Q. I'm sorry. What did you mean when you
19 said that there was expanding into the chemistry
20 area? What did that refer to?

21 A. We did hematology, not general
22 chemistries. We didn't have a machine nor did we
23 make one or ever sell one as Drew. So we were now
24 looking at expanding our product offering to a new
25 line of products called chemistry machine, and

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1 R. DePIANO - 4/2/08

2 was the situation.

3 Q. In the medical diagnostic device field,
4 approximately what time frame would you consider a
5 product to be dated? How long would a product be
6 out there before it could be considered dated, given
7 the pace of change in the medical diagnostic field?

8 MR. COSTANTINI: You mean is there a
9 general rule for such things?

10 BY MR. CAPLAN:

11 Q. To your understanding.

12 A. I don't know the specific time frame that
13 one would be considered dated. I can say more from
14 manufacturing the product rather than selling the
15 product.

16 Manufacturing becomes difficult after --
17 especially if electronic components are involved.
18 After three years you have to really look at what
19 other offerings are out there for replacements.

20 Q. And do you have an understanding as the
21 CEO of Escalon of the approximate time at which a
22 medical diagnostic product would be considered dated
23 from a sales or a competitive point of view?

24 A. No, I don't.

25 Q. Just to back up, when we started on this

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1 R. DePIANO - 4/2/08

2 offering the consumables which go along with that
3 product.

4 Q. If I could just back up for a sec.

5 When Escalon bought Drew, prior to that
6 time had Drew developed any medical devices?

7 A. I believe everything that Drew owned was
8 developed by them, except for one OEM arrangement.
9 I believe that OEM arrangement was a design provided
10 by the ultimate customer that we made the machine
11 for them.

12 Q. And when Escalon bought Drew, did Escalon
13 intend that Drew would continue to develop medical
14 devices?

15 A. Yes.

16 Q. That was part of the business plan for
17 Drew?

18 A. Yes.

19 Q. And did Escalon investigate Drew's skills
20 or competence in the product development area as
21 part of the acquisition?

22 A. Before or after?

23 Q. In the process of acquiring Drew.

24 So whatever due diligence or
25 information-gathering led to buying Drew, did

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1 R. DePIANO - 4/2/08

2 was the possibility that was under discussion?

3 A. They were going to bring a consumable
4 which would be available for us to market in the US
5 and other places.

6 Q. Were there other parts of the deal under
7 discussion when you learned about it?

8 A. Yes. That we would modify, with their
9 help, our 2280 existing platform machine.

10 Q. When you learned about this possible
11 collaboration, were there any other parts of the
12 transaction, to your knowledge?

13 A. Other parts?

14 Q. Yes.

15 A. Yes.

16 Q. Okay. I'm sort of saying early on when
17 you first learned that there's a discussion between
18 Drew and PointCare, you've described a couple
19 components of the discussion.

20 Are there other components of the
21 discussion early on, to your memory?

22 A. Most of the discussions between PointCare
23 and Drew were handled directly by Harry Rimmer, and
24 he would apprise me of what was going on.

25 Q. Was there anyone else on behalf of Drew or

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2 number of months it took to negotiate the contract.

3 Q. And Mr. Rimmer was Drew's primary contact
4 with PointCare for contract negotiations?

5 A. Yes.

6 Q. And Mr. Rimmer kept you apprised of the
7 discussions?

8 A. Yes.

9 Q. And you gave him feedback along the lines
10 of what you've just told us?

11 A. Uh-huh. Yes.

12 MR. COSTANTINI: She can't do "uh-huh."
13 BY MR. CAPLAN:

14 Q. So you expressed the view to Mr. Rimmer
15 that you were very critical of the prospect of a new
16 arrangement with PointCare because the focus of
17 Drew's business plan at the time was to continue on
18 the path of improving existing products.

19 What did you say to him about that?

20 A. Well, I was -- first of all, we were
21 approached by PointCare, who indicated -- and I was
22 part of that discussion after it was started; I
23 don't remember the exact dates -- that our machine
24 was indicative of a platform that could be modified
25 to take their specific reagent, and they were very

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1 R. DePIANO - 4/2/08

2 Escalon who was part of a negotiation team for
3 this -- relative to PointCare along with Mr. Rimmer?

4 A. Well, at one point I was introduced to the
5 process. The negotiations -- I'm not sure who else
6 participated with Harry in negotiations, but there
7 was a Ken Pina, an attorney, who was working for us
8 who assisted Harry in the actual creation of the
9 documents.

10 Q. Do you recall that an agreement was signed
11 in approximately June of 2006?

12 A. Oh, yes.

13 Q. And prior to that signing of the contract,
14 what was your personal involvement either with the
15 negotiations or behind the scenes or in any other
16 respect?

17 A. I was very critical of the prospect on the
18 basis that the focus at the time of our business
19 plan was to continue along the path of improving the
20 existing products. And this would have created a
21 reallocation of resources, and I wanted to explore
22 more of what the impact would be on our business.

23 Q. That was your position prior to an
24 agreement being entered?

25 A. Yes. During this five, six, whatever

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2 much interested in getting a machine to actually
3 provide the platform for the reagent or the
4 proprietary -- quote, proprietary technology that
5 they had developed.

6 And I was extremely skeptical, because I
7 had asked our people whether we had knowledge --
8 enough knowledge to actually handle the project
9 ourselves and was made aware of the fact we had
10 never worked with gold or did anything like the CD4
11 type of reagent.

12 So my concern was, you know, how would we
13 be able to get this accomplished.

14 And I was reassured that -- after the due
15 diligence was done on the fact that our platform was
16 capable of being adapted or appeared to be capable
17 of being adapted, that the expertise lied at
18 PointCare to assist in that development.

19 Q. You understood that the business
20 proposition under discussion was a possible
21 arrangement between PointCare and Drew where
22 PointCare brought to the table its proprietary
23 reagent, and the notion was that a preexisting Drew
24 platform could be modified to work with the reagent?

25 A. Correct.

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1 R. DePIANO - 4/2/08

2 MR. COSTANTINI: You mean before Peter
3 opened his mouth, what he thought.
4 BY MR. CAPLAN:

5 Q. Did you understand my question, sir?

6 A. Yes.

7 My impression was that they were capable
8 of doing the work that they had been doing up to
9 that point in time, which was on hematology
10 equipment that was in our basic product line.

11 This was moving us into another product
12 line, as I was told, doing something we had never
13 done before. So the skillsets that existed in my
14 opinion were very good for what they were doing.
15 This is something new. I had no way of evaluating
16 whether or not their skillsets were adequate to take
17 on a new project.

18 Q. And you understood that the opportunity on
19 the table was for Drew to modify its existing 2280
20 platform to accommodate PointCare's proprietary
21 assay?

22 A. Yes.

23 Q. And when you describe it as a proprietary
24 assay, what do you mean by that?

25 A. I was led to believe that the CD4 assay,

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1 R. DePIANO - 4/2/08

2 thought that was the case.

3 Q. Was it important and valuable to you that
4 PointCare's assay was proprietary?

5 A. Absolutely. That was the one of the key
6 factors for us going into this transaction.

7 Q. And did you or your people do any due
8 diligence on that fact prior to entering this
9 agreement?

10 A. I did not. I believe Harry did talk --
11 and I think there was a patent pending or filed or
12 something like that, but I don't think it was issued
13 at the time.

14 Q. And did Mr. Rimmer report back you to the
15 results of his due diligence regarding the
16 proprietary nature of PointCare's assay?

17 A. Yes. He believed that based on people he
18 spoke to, and Peter -- I don't know who else he
19 spoke to -- that, yes, this was, you know, actually
20 going to be out of the general public's domain and
21 very limited.

22 Q. And did you understand once Drew entered
23 this agreement with PointCare that the assay
24 remained PointCare's proprietary property?

25 A. Yes.

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2 which was their -- or Peter's and Petra's; I'm not
3 sure which one developed it -- but it was -- Peter
4 was, you know, an intellectual property, capably
5 patented and would not be available to the rest of
6 the market -- competitive marketplace.

7 So when I was first introduced to the
8 concept, we have an opportunity to be one of the
9 only other people besides PointCare that has this
10 particular assay and would give us a competitive
11 position in the marketplace, because other than
12 PointCare, nobody else would have access to that
13 product; and we would have a competitive advantage
14 in the marketplace against competitors that we
15 viewed in hematology.

16 Q. And you had that understanding that
17 PointCare's assay was proprietary when Drew entered
18 its agreement with PointCare, correct?

19 A. Yes. I thought it was patentable at that
20 point in time and was unique, relying again on the
21 expertise of Peter and his credentials that this was
22 the case. Otherwise, for a me-too product, if
23 anybody else can make the same thing, it would have
24 definitely been totally unattractive and I would
25 never have went forward with the project if I

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2 Q. The time frame of my next question starts
3 from when PointCare entered its contract with Drew,
4 June of 2006, until the time that Drew filed this
5 lawsuit.

6 So from the time that the contract was
7 signed until this lawsuit got started, was it your
8 understanding throughout that time period that
9 PointCare's assay was proprietary to it?

10 A. Yes.

11 Q. Has that understanding changed since then?

12 A. Yes.

13 Q. How so?

14 A. Through the process of this discovery, if
15 that's the right term, or litigation, I was advised
16 that the patent, which we didn't know, was denied.

17 Q. Who told you that?

18 A. The host of people that have been reading
19 the documents. It could have been one of four
20 people. I'm not sure exactly which comment was
21 made. It could have been Frank Matuszak and/or one
22 of my attorneys that said in the documents supplied
23 there was an indication that the technology was that
24 prior art existed and therefore it was questionable;
25 and that ultimately it did get rejected.

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2 **Q. Do you have expertise in the patent law**
3 **area, sir?**

4 A. I don't have expertise in anything.

5 **Q. Do you have an understanding whether the**
6 **alleged denial of PointCare's patent application on**
7 **its assay -- whether that's final or subject to**
8 **further review?**

9 A. I don't know.

10 **Q. So at least for the entire time of the**
11 **business relationship between Drew and PointCare, at**
12 **least until the filing of the lawsuit, you**
13 **understood as CEO of Escalon that Drew's -- strike**
14 **that -- that PointCare's assay was proprietary to**
15 **it, correct?**

16 A. Yes. That was my understanding.

17 **Q. And, as such, it would have violated**
18 **PointCare's proprietary rights in its assay for**
19 **someone to try to copy it, for example, or reverse**
20 **engineering.**

21 **Do you agree with that?**

22 A. Yes.

23 **Q. Prior to the contract being signed, do you**
24 **recall personally attending any meetings with any**
25 **representatives of PointCare?**

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2 **Q. Do you remember anything else from that**
3 **conversation?**

4 A. From that particular conversation, no.
5 That's that sticks out mostly in my mind.

6 **Q. And, again, prior to the contract between**
7 **the parties being signed, do you remember any other**
8 **direct communications between yourself, Peter, Petra**
9 **or anyone else from PointCare in person, on the**
10 **phone, however?**

11 A. There probably was discussions. I don't
12 know if they were all in person or by phone.

13 **Q. As we sit here today, do you remember the**
14 **substance of any communications between yourself and**
15 **any folks at PointCare prior to signing this**
16 **contract?**

17 A. Only the one discussion that's centered on
18 the fact that -- and I think it was with Peter and
19 Petra together that we talked about their ability to
20 fix any problems we would have in getting our
21 machine converted.

22 **Q. And what was said about that?**

23 A. That Peter could solve those problems;
24 that's what Peter did; and Peter was very good at
25 that.

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2 A. The dates escape me, but I know we had
3 dinner in Marlboro. I don't know if it was before
4 the signing or -- it was early on, but I don't
5 remember the exact timing. In Marlboro we had
6 dinner. I was not in attendance when -- I think it
7 was just Peter or Peter and one of his co-workers
8 went to Dallas to look at the machine, and that was
9 before the contract was signed.

10 I'm sure there was a meeting or two. I
11 just don't remember the dates.

12 **Q. Just more broadly, do you remember having**
13 **any direct communications, either in person or on**
14 **the phone or e-mail, or however, with Peter, Petra**
15 **or any of the folks from PointCare before signing a**
16 **contract?**

17 A. I remember telephone conversations with
18 Harry and Petra where I was in the room and we were
19 going -- they were negotiating different aspects.

20 **Q. Do you remember any substance of that**
21 **conversation?**

22 A. It was around pricing. Mostly around
23 pricing, as I recall. There was a lot of issues
24 around the reagent pricing and structure of the
25 deal.

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2 **Q. To your understanding, whose**
3 **responsibility was it under this contract to modify**
4 **Drew's existing platform to accommodate PointCare's**
5 **assay?**

6 A. Under the contract, as it was written,
7 Drew bore the expense and the responsibility for
8 modifying the 2280.

9 **Q. To accommodate PointCare's assay?**

10 A. Yes.

11 **Q. And going into the contract, you knew that**
12 **Peter Hansen and perhaps other colleagues at**
13 **PointCare had the skills to help Drew in that**
14 **regard, correct?**

15 A. Yes.

16 **Q. But ultimately you understood under the**
17 **contract that the responsibility fell on Drew to**
18 **modify its platform to work with PointCare's assay,**
19 **correct?**

20 A. Yes. And at the time, the responsibility
21 was fixed because of the costs associated with it.
22 We should bear that.

23 **Q. So Drew bore responsibility for the costs**
24 **of accommodating its platform to PointCare's assay,**
25 **correct?**

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2 do that.

3 Q. So you expected a lot of help from
4 PointCare?

5 A. Absolutely. We never would have went into
6 this, because it was totally out of -- foreign to
7 anything we had ever done before.

8 Q. And understanding that you expected a lot
9 of help from PointCare, isn't it a fact that you
10 understood that ultimately Drew was responsible for
11 the successful modification of the platform to
12 accommodate the assay?

13 A. I'd have to answer that no.

14 Q. Why not?

15 A. Because we couldn't do it. I knew we
16 couldn't do it the day when I went in there. And I
17 told you my objection for not getting involved is we
18 didn't have the expertise. So the responsibility
19 for having the knowledge was because it was
20 represented by PointCare that they had that
21 knowledge and could do it.

22 Q. So it's your position that the day that
23 Drew signed this manufacturing, distribution and
24 co-marketing agreement with PointCare, Drew did not
25 have the technical skills on its own to modify its

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2 platform?

3 A. Peter Hansen.

4 Q. Did he say that to you personally?

5 A. Yes.

6 Q. Where and when?

7 A. I don't remember where it was. It was
8 either -- one of the conversations we had during
9 this period of time.

10 You got to remember that PointCare
11 solicited us, and we had a basic machine that they
12 wanted modified. They had the reagent that was
13 supposedly their business premise. They wanted to
14 sell this reagent, and they needed another platform
15 other than the one they had, so they solicited us.

16 We didn't have any knowledge of CD4 in
17 terms of applying it in our business prior to
18 meeting PointCare. So everything we did to get
19 enticed into this arrangement was based on the
20 knowledge that they represented to us that they
21 possessed.

22 Q. What exactly did Peter Hansen say to you,
23 as best as you can remember?

24 A. Our platform was a well-constructed
25 machine. And it is very capable with modifications

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2 platform to accommodate PointCare's assay, correct?

3 A. Correct. That was my understanding.

4 Q. I know we've covered a lot of ground, but
5 let me just try to ask you a general question.

6 You've described to us PointCare's
7 representations about its capabilities to assist
8 PointCare.

9 My question to you is, who specifically at
10 PointCare made those representations to you?

11 A. To assist PointCare? I don't --

12 MR. COSTANTINI: I think you got tangled
13 up in your question. If you want it read back.

14 MR. CAPLAN: It took me until 2:30 to get
15 tangled up. I'm having a good day.

16 (A discussion was held off the record.)

17 MR. COSTANTINI: You want her to read it
18 back?

19 MR. CAPLAN: No. Being told my question
20 was bad is bad enough. I don't need to hear it
21 again.

22 BY MR. CAPLAN:

23 Q. Who at PointCare represented to Drew or
24 Escalon that PointCare had these various
25 capabilities to assist Drew in adopting the

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2 to handle what they wanted in a fast throughput or a
3 more speedy throughput of their product versus a
4 slower one.

5 I don't know exactly what that means,
6 but ...

7 And I remember the conversation dealt with
8 a mixer. I didn't even know we had a mixer in
9 there. I had no idea what the mixing was all about;
10 but mixing something, and it needed to be more
11 robust.

12 And they talked about the idea of a --
13 replacing some parts that would be more beneficial,
14 more efficient, or do things better. It had to do
15 with an optinet (phonetic) or a camera or something
16 like that.

17 And that was the conversation where they
18 assured me, yes, you guys know how to build them,
19 and you can build them after you got a platform that
20 we could start from, these modifications can be
21 done, and they were going to do all the assistance
22 needed to get that to work, and we needed their
23 chemistries and their software.

24 But, literally, Peter was going to have a
25 hands-on responsibility for doing that. Otherwise,

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 2 I had no intention at that stage in the company to
 3 divert the resources which we did have away from
 4 projects that they were working on. Because this
 5 was totally new. It was nothing we were -- on our
 6 drawing board or that I even knew about was
 7 something we wanted in the future. It was an
 8 opportunity brought to us by PointCare. And based
 9 on that, we decided to move forward.
 10 **Q. When did Peter Hansen say that to you?**
 11 A. I don't remember.
 12 **Q. Before or after June of '06?**
 13 A. I think it was before.
 14 I wasn't willing to do this project unless
 15 we had some comfort regarding our ability to
 16 perform.
 17 **Q. Do you have a clear memory that Peter**
 18 **Hansen made these representations to you before**
 19 **Mr. Rimmer signed the contract for Drew?**
 20 A. I'm pretty sure he did.
 21 **Q. Is that on the phone or in person?**
 22 A. I don't remember.
 23 **Q. Do you remember anything about the**
 24 **conversation, the circumstances of the conversation?**
 25 A. I just remember the mixer, because I

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 2 MR. COSTANTINI: I think the word is
 3 "guide." I think the wording in his testimony
 4 was "guide," not "help."
 5 MR. CAPLAN: Could I have the question
 6 back, please.
 7 (The last question was read back by the
 8 Reporter.)
 9 A. To actually physically do the work under
 10 his guidance, and we would be responsible for paying
 11 for it.
 12 **Q. Did Peter Hansen or anyone else at**
 13 **PointCare ever represent to you that PointCare would**
 14 **be responsible to modify the platform to accommodate**
 15 **the assay?**
 16 A. No. PointCare never took that
 17 responsibility to modify it. They took
 18 responsibility for providing knowledge to modify it.
 19 MR. COSTANTINI: Is this a logical break
 20 time?
 21 MR. CAPLAN: Read my body language.
 22 (Recess at 2:31 p.m.)
 23 (Deposition resumes at 2:51 p.m.)
 24 BY MR. CAPLAN:
 25 **Q. Prior to Drew signing the contract with**

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 2 didn't know we had a mixer.
 3 It's the only word I understood in the
 4 whole conversation.
 5 **Q. I've had those conversations myself.**
 6 **So it's your testimony that Peter Hansen**
 7 **gave you a comfort that he and his people would**
 8 **assist Drew to adopt their platform to accommodate**
 9 **PointCare's assay, right?**
 10 A. Yes.
 11 **Q. Did Peter Hansen ever represent to you**
 12 **that PointCare would be ultimately responsible to**
 13 **modify Drew's platform to accommodate PointCare's**
 14 **assay?**
 15 A. Not to modify.
 16 **Q. That was Drew's responsibility?**
 17 A. To modify. He represented that he would
 18 be able to guide our people through the process and
 19 show them how to get it done. He had the knowledge.
 20 **Q. So in a nutshell, you understood from**
 21 **talking to Mr. Hansen that he and his people would**
 22 **help Drew to modify the platform to accommodate the**
 23 **assay and that Drew would be responsible to do that**
 24 **work?**
 25 A. To pay for it.

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 2 **PointCare, aside from speaking with Peter Hansen,**
 3 **did you do anything to satisfy yourself that Drew**
 4 **had the capabilities to monitor its platform to**
 5 **accommodate PointCare's assay?**
 6 MR. COSTANTINI: You mean "modify"? I
 7 think you said "monitor."
 8 THE WITNESS: Monitor the platform?
 9 BY MR. CAPLAN:
 10 **Q. I meant to say "modify."**
 11 A. Modify the platform?
 12 **Q. Why don't I start again, because we**
 13 **probably lost the question.**
 14 **Prior to signing the contract, did you do**
 15 **anything other than talking to Peter Hansen to**
 16 **satisfy yourself as the Escalon CEO that Drew had**
 17 **the capabilities to modify its existing 2280**
 18 **platform to accommodate PointCare's assay?**
 19 A. I personally did not do anything.
 20 **Q. Did you ask any of your subordinates to do**
 21 **anything to satisfy yourself of Drew's capabilities**
 22 **to modify its platform to accommodate PointCare's**
 23 **assay?**
 24 A. I was given assurances by Harry that --
 25 Harry Rimmer, who was then president of Drew, that

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2 **from PointCare?**

3 A. There were other people at PointCare, but
4 my only interaction was very limited to -- I met
5 several people, but they weren't really -- I met a
6 KC. I forget his last name. And I met Eric, who is
7 the controller.

8 **Q. Eric Newman?**

9 A. Eric Newman was the controller who didn't
10 get really into any of the technical things.

11 And then I met the vice president of
12 sales.

13 **Q. Dan O'Connor?**

14 A. Yeah. First time I met him at dinner. We
15 were up at dinner before the -- before the agreement
16 was signed in Marlboro. It was an experience.

17 **Q. Yeah. What do you mean when you say that?**

18 A. It was a great dinner.

19 **Q. And you understood prior to signing this**
20 **agreement that PointCare had previously had a deal**
21 **with a distributor to manufacture a different**
22 **platform that worked with its assay, right?**

23 A. I don't know if it was a distributor, but
24 I know that they had a vendor who manufactured
25 equipment which they sold. I think they were the

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2 spare parts, and there was a machine that had
3 already been in the market or something that could
4 be cannibalized in spare parts from that machine.
5 And even I believe I heard a conversation about the
6 fact that if we get trade-ins of that particular
7 model, whatever it was, I don't know the name of it,
8 they would be interested in taking those machines.

9 **Q. So --**

10 A. Poor cannibalization of parts.

11 **Q. So when PointCare came to Drew about a**
12 **possible business relationship, you understood that**
13 **PointCare's supply of the CD4 instrument had been**
14 **ended for one reason or another?**

15 A. Yes.

16 **Q. And PointCare was coming to Drew hoping to**
17 **find a supply of platforms that work with the CD4**
18 **assay, right?**

19 A. I believe we were one of several companies
20 they explored the possibility with.

21 **Q. And did you understand from your**
22 **discussions with Petra Krauledat or Peter Hansen or**
23 **others that there was some urgency on PointCare's**
24 **part to obtain a new platform that they could sell**
25 **with their assay?**

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2 distributor. PointCare was the distributor of
3 equipment that utilized -- or had the ability to
4 utilize the CD4 assay that they stated was
5 proprietary to them. And I said earlier they had
6 some number of machines out there; that they had
7 sold 60 machines or something.

8 **Q. And when PointCare came to Drew about**
9 **expressing interest in Drew modifying its platform**
10 **to work with the PointCare assay, you understood**
11 **from the folks at PointCare that their prior**
12 **relationship with the vendor who manufactured the**
13 **instruments that work with the CD4, that**
14 **relationship had come to an end for some reason or**
15 **another, right?**

16 MR. COSTANTINI: I'm sorry. Could I hear
17 that one again.

18 (The last question was read back by the
19 Reporter.)

20 A. There were two aspects to that -- the
21 answer. One is yes, I understand that it was ended.
22 I don't know all the reasoning behind it, but it was
23 no longer, you know, the case that they were going
24 to get the equipment.

25 And I know that they were looking for

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2 A. Yes.

3 **Q. Why do you say that?**

4 A. Well, because up front when Harry -- it
5 was either Harry or in one of the discussions, they
6 wanted to get this done quickly.

7 **Q. So --**

8 A. Very quickly.

9 **Q. -- Harry Rimmer made that clear to you?**

10 A. Yes.

11 But then I kind of raised an issue about
12 if we wanted to do this so quickly, why is it taking
13 over six months to get a contract done.

14 **Q. Who did you raise that to?**

15 A. Harry.

16 **Q. What did he say?**

17 A. Just it's taking that long to get all the
18 details worked out in the contract.

19 **Q. Did you ever do an investigation to**
20 **determine how much of the delay was attributed to**
21 **Mr. Rimmer's ability to move a contract forward?**

22 A. No. But in my past experience, everybody
23 goes this way, which is the hand sign that says it's
24 not my fault; it's everybody else's fault. So who
25 shot who, I don't know.

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 2 project from Drew's side?
 3 MR. COSTANTINI: From that point forward.
 4 A. Harry Rimmer.
 5 Q. Back up for a second.
 6 We've talked about PointCare's NP
 7 instrument and we've talked about that under this
 8 agreement it was contemplated that Drew would have
 9 certain rights to distribute and market the NP
 10 instrument.
 11 My question is, when this contract was
 12 signed, did you have an understanding of whether
 13 there were any preconditions for Drew to have the
 14 right to distribute and market the NP instrument?
 15 A. No.
 16 Q. To avoid having to mark another copy of
 17 the agreement, I'm going to try a question just
 18 reading you a sentence or two, and if I need to mark
 19 it, I will, but I'm trying to save a tree or two
 20 here.
 21 Just reading you from Article 1.1 of the
 22 contract where -- I'll just read you two sentences.
 23 "PointCare shall grant Drew nonexclusive worldwide
 24 distribution rights for such NP platform. Such
 25 distribution rights will be conditional upon the

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 2 Q. And I understand you're not a technical
 3 person. Neither am I. But from your understanding,
 4 what state of preparedness was the HT?
 5 A. It was complete and able to be used by
 6 PointCare to do the part of the contract that they
 7 were supposed to do.
 8 Q. And which part was that?
 9 A. Get the reagent and the software, whatever
 10 was done, to work together with our machine.
 11 Q. At that time did the instrument meet the
 12 contract specifications?
 13 A. I was told it did.
 14 Q. By whom?
 15 A. By our people in Dallas. And by a
 16 consultant.
 17 Q. Herbert Chow?
 18 A. Yes.
 19 Q. Did you have a personal conversation with
 20 Herbert Chow about that?
 21 A. No.
 22 Q. So who were the folks in Dallas that told
 23 you the HT met specifications at that time?
 24 A. Doug Nickols I believe was the one who
 25 stated that.

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 2 successful development and marketing of the HT
 3 platform."
 4 Do you have an understanding of what those
 5 sentences mean, sir?
 6 A. I do.
 7 Q. And what's your understanding?
 8 A. That you don't get the right to market the
 9 NP unless you develop the HT.
 10 Q. "Yes" or "no," has the development of the
 11 HT been accomplished?
 12 A. Yes.
 13 Q. What do you mean when you say that?
 14 A. It was ready as far as we can go months
 15 ago.
 16 Q. Ready for what purpose?
 17 A. To have PointCare fulfill its part of the
 18 obligation.
 19 Q. What state of completion was the HT at
 20 that time?
 21 A. What time are you talking about?
 22 Q. The time you're talking about when you say
 23 that it was ready.
 24 A. It was ready to be shipped to PointCare
 25 for their part of the contract to complete.

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 2 Q. As best as you can recall, what did
 3 Mr. Nickols tell you about that?
 4 A. Machine is ready to be shipped.
 5 Q. Did he say anything else beyond the
 6 statement the machine is ready to be shipped?
 7 A. Relevant to this, no.
 8 Q. Did Mr. Nickols actually tell you the
 9 machine met specifications under the contract?
 10 A. They had fulfilled everything that they
 11 needed to under the contract, and it was also the
 12 opinion of Herb Chow, and we had to report to that
 13 end is what I was told.
 14 Q. And you relied on Mr. Nickols in that
 15 regard?
 16 A. Of course.
 17 Q. Did anyone tell you that Herb Chow had
 18 determined that the HT met all of the contract
 19 specifications?
 20 A. Yes.
 21 Q. That's what Mr. Nickols told you?
 22 A. Yes. I didn't speak directly to Herb
 23 Chow.
 24 Q. Did you read his report?
 25 A. No.

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2 have?

3 A. I believe he would have, yes.

4 Q. What type of skills or what did Peter
5 bring to the table that Drew lacked at the time?6 A. They didn't have anybody with Peter's
7 background and/or in my opinion knowledge and
8 vision.

9 Q. Technical knowledge?

10 A. Technical knowledge.

11 Q. And I think you said there were two things
12 of interest to you about a possible combination
13 between PointCare and Drew. Hansen was one. What
14 was the other one?15 A. To have a proprietary -- I thought was a
16 proprietary consumable.17 Q. So where did the possibility go from that
18 initial conversation?19 A. Well, we were -- I thought we were pretty
20 serious in pursuing it. And, obviously, if you know
21 what a public company's requirements are, they must
22 have fairness opinions on any transaction that would
23 involve stock.24 And we got to the point where due
25 diligence proceeded. And Petra was very dogmatic

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2 He had performed a valuation of our
3 goodwill in Drew for purposes of, you know, the
4 independent accountant's report for impairment.5 Q. And at the time did PointCare give Drew a
6 valuation -- its own valuation of PointCare?7 A. Supplied me with a valuation done by I
8 believe a third party. It wasn't done by -- it was
9 done by a third party.

10 Q. Fair enough.

11 And in sum and substance, that was the end
12 of the merger talks?13 A. When I got the memo that said we were at
14 an impasse and the numbers aren't going to work,
15 that was it.16 Q. To your observation, did that have any
17 effect on the working relationship between PointCare
18 and Drew?19 MR. COSTANTINI: Observation at the time
20 now?

21 MR. CAPLAN: Right.

22 A. At the time I didn't think it would; but
23 with hindsight after this investigation, it clearly
24 did.

25 Q. At any time prior to the filing of the

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2 about staying on a definitive timetable to get the
3 due diligence done. And then we got to valuation.
4 We hired an independent firm that we've used before
5 to value PointCare.

6 Q. What happened from there?

7 A. They started to do the valuation and
8 basically gave us some preliminary valuations. And
9 I, as soon as I got them, called Petra and said
10 they're not coming out anywhere near where you're
11 going to be happy, and gave her the numbers.12 And she had interacted with Steve Sherf,
13 who was the person responsible for the valuation.
14 So --15 Q. Sherf did Drew's evaluation [sic] of
16 PointCare?

17 A. Yes.

18 And the report, in draft, indicated a much
19 lower valuation than what was expected. Passed it
20 on to Petra.21 And she basically wrote back and said
22 we've reached an impasse valuation just isn't ...23 Q. In this context, did Drew have Sherf do a
24 valuation of Drew?

25 A. No.

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2 lawsuit, did you believe that the merger discussions
3 had hurt the working relationship between the
4 parties in any way?5 A. Hurt, no. I didn't believe -- personally
6 I didn't believe. I thought Petra understood -- she
7 was the point person -- understood the fact that I
8 alone do not make the decision. I have a board of
9 directors. We're a public company, and they do
10 follow the rules, especially given today's
11 environment. As such, that report would have -- I
12 knew that that report was not going to be
13 acceptable, and my board would not go against an
14 independent third party.15 Q. Did the failed merger discussions cause
16 any friction between the parties?

17 A. At the time?

18 Q. Yes.

19 A. At the time, I didn't believe it did.

20 Q. Prior to the filing of the lawsuit, did
21 you think that the failed merger talks had caused
22 any friction between the parties?23 A. Clearly started to have my suspicions
24 about everything that was going wrong was always
25 Drew's fault. PointCare was holier than thou during

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2 Drew ended in approximately June of 2007; is that
3 right?

4 A. Yes.

5 Q. After that time, did you ever give any
6 further consideration to trying to acquire
7 PointCare?

8 A. Did I give? No. Escalon was not
9 interested after that.

10 Q. After merger discussions between the
11 parties ended, did you ever consider the possibility
12 of Escalon or Drew merging with or somehow combining
13 with PointCare?

14 A. Well, by "consider," you mean did I ever
15 think about it? Did I act upon it? Did I convey it
16 to my board? What specifically do you mean by
17 "consider"?

18 Q. Did it ever cross -- any of those --

19 A. Crossed my mind. Crossed my mind.

20 Q. After the merger discussions ended, did
21 you ever speak with any colleagues from Drew or
22 Escalon about a possible combination transaction
23 with PointCare?

24 A. Yes.

25 Q. Who did you discuss that with?

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2 A. Frank Matuszak.

3 Q. When?

4 A. After the merger was not consummated.
5 Sometime after that. I don't know when.

6 Q. 2007?

7 A. I'm not sure if it was late 2007 or '8,
8 but it was a conversation, not an action step.

9 Q. Who initiated the conversation between you
10 and Mr. Matuszak?

11 A. Frank mentioned it to me.

12 Q. What did he mention to you?

13 A. That will we have any interest in going
14 after PointCare -- talking to their board about a
15 potential merger.

16 Q. Talking to what board?

17 A. PointCare's board.

18 Q. What else did Mr. Matuszak say you to
19 about that?

20 A. Did I have any interest in talking to
21 their board.

22 Q. What else did he say?

23 MR. COSTANTINI: Why do you think he said
24 something else?

25 A. With regard to us acquiring them?

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2 Q. Did Mr. Matuszak say anything else?

3 A. Not about the acquisition, no.

4 Q. That's it. That's all he said.

5 In substance he said to you would Escalon
6 be interested in communicating with the PointCare
7 board about a possible combination?

8 A. Regarding that item, yes, that's all he
9 said about that item.

10 Q. Did he mention that he was speaking to
11 anyone outside of Drew or Escalon about that topic?

12 A. He said that he was only speaking to one
13 person, a former employee, Dan O'Connor.

14 Q. And you understood that Dan O'Connor was a
15 former employee of PointCare?

16 A. At that time. He had left back in June,
17 July, something like that.

18 Q. And so Mr. Matuszak came to you and he
19 told you that he was having discussions with former
20 PointCare employee Dan O'Connor about whether
21 Escalon would be interested in a possible
22 combination with PointCare, right?

23 Strike that. Let me ask it more
24 generally.

25 Mr. Matuszak told you that he had been

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2 having some conversations with Mr. O'Connor, right?

3 A. That they were communicating. Whether it
4 was verbal, e-mail, I don't know.

5 Q. And did he tell you what he and
6 Mr. O'Connor were communicating about at that time?

7 A. They were talking mostly business, from
8 what I understand.

9 Q. What were they discussing relative to the
10 issue that we're talking about here?

11 A. The merger?

12 Q. Yes.

13 A. Just the fact that Dan O'Connor indicated
14 that would I be interested in talking to their board
15 about acquiring PointCare.

16 Q. Did Mr. Matuszak tell you anything else
17 about his discussions with Mr. O'Connor?

18 A. Yeah. He mentioned that they had several
19 discussions or communications about many issues.

20 Q. What other issues?

21 A. All related to business matters. I think
22 there was one -- they had some talk about an
23 individual that was a friend of Dan's and maybe
24 looking for a job and things of that nature. And I
25 think he even talked about Dan being a consultant or

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 2 employee of Escalon -- or of Drew.
 3 **Q. So Mr. Matuszak told you that he had been**
 4 **communicating with former PointCare employee**
 5 **O'Connor about various business issues, right?**
 6 A. Yes.
 7 **Q. Did he tell you that he'd been speaking to**
 8 **Mr. O'Connor about former business issues related to**
 9 **PointCare?**
 10 A. Yes.
 11 **Q. And what were those issues that he told**
 12 **you he'd been discussing with Mr. O'Connor relative**
 13 **to PointCare?**
 14 A. Issues with management, issues with the
 15 business. I don't remember all the specifics.
 16 **Q. What other issues do you remember that**
 17 **Mr. Matuszak told you he was discussing with**
 18 **Mr. O'Connor about PointCare business?**
 19 A. Other than those -- there's probably
 20 several more, but I don't remember exactly what they
 21 were.
 22 You have to realize that I didn't put a
 23 lot of stock and faith in Mr. O'Connor. I was not
 24 one of his fans. As a matter of fact, I even went
 25 as far to mention to Petra before the merger I would

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 2 in Marlboro, and we went to dinner.
 3 **Q. And based on a single meeting with him, he**
 4 **wasn't the type of guy you particularly cared to do**
 5 **business with, was he?**
 6 A. I would not want to be that very dependent
 7 on a guy like him, yes, that's right.
 8 **Q. Did he strike you as untrustworthy?**
 9 A. I didn't say untrustworthy. No, he wasn't
 10 untrustworthy. I just think he was -- lacked a lot
 11 of substance. And he fell in love every morning
 12 when he woke up and looked in the mirror. So, I
 13 mean ...
 14 **Q. So at some point in late '07 or early '08,**
 15 **your director of sales, Mr. Matuszak, tells you that**
 16 **he's been having some ongoing communications with**
 17 **Mr. O'Connor about PointCare business, right?**
 18 A. Yes.
 19 **Q. And you mentioned one of those issues**
 20 **related to management.**
 21 **What were you told about that?**
 22 A. That basically he didn't have a lot of
 23 confidence in the current management's leadership
 24 and that there may be an opportunity to deal
 25 directly with the board on this -- on a merger

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 2 have a very difficult time working with that guy.
 3 I met him the first time at a dinner in
 4 Marlboro with Petra, Peter, Harry, and I forget who
 5 else was there, but -- and I just really didn't feel
 6 very comfortable with him, and I --
 7 **Q. Why not?**
 8 A. I thought he was -- blew a lot of smoke.
 9 It was all smoke and mirrors. I didn't know if he
 10 had any substance. But Petra assured me that he was
 11 -- a lot of experience in the industry and all these
 12 other accolades about his credentials. So I said,
 13 well ...
 14 So when somebody mentions what he might or
 15 might not say to me, I don't really focus very well
 16 on that.
 17 **Q. Let's just explore what you do remember.**
 18 **Let me ask you this question.**
 19 **Is it fair to say Mr. O'Connor made a poor**
 20 **first impression on you?**
 21 A. Yes.
 22 **Q. Right from the beginning, you didn't think**
 23 **much of him?**
 24 A. I only met him via the first meetings
 25 before the contract was signed. I think I was there

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1 R. DePIANO - 4/2/08
 2 opportunity.
 3 **Q. You used some "he's" in there.**
 4 **Is it that --**
 5 A. Mr. O'Connor -- Frank told me Mr. O'Connor
 6 didn't have a lot of confidence and did feel that
 7 approaching the board would be a good idea.
 8 **Q. And Frank told you that O'Connor said that**
 9 **O'Connor did not have a lot of confidence in**
 10 **PointCare's management, right?**
 11 A. Yes. He didn't have any confidence in me
 12 either. He didn't trust me. He also told me that.
 13 **Q. Did Mr. Matuszak tell you that**
 14 **Mr. O'Connor was advocating that Escalon do**
 15 **something about a possible merger?**
 16 A. Yeah. What I said. He said that we
 17 should go directly to the board.
 18 **Q. Beyond passing along O'Connor's view on**
 19 **that, did Mr. Matuszak express his opinion to you**
 20 **about that possibility?**
 21 A. He just asked me what I thought.
 22 **Q. Did he express an opinion one way or the**
 23 **other?**
 24 A. No, he didn't express an opinion saying it
 25 was good, bad or different. To me, anyway.

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1 R. DePIANO - 4/2/08
 2 their board with regard to a merger, why doesn't he
 3 do it.
 4 Q. Did you give Mr. Matuszak any guidance at
 5 all about whether or not you thought it would be
 6 appropriate for him to continue discussions with
 7 Mr. O'Connor about the possibility of Escalon
 8 contacting the PointCare board about a transaction?
 9 A. I'm sorry. Can you just repeat that
 10 again.
 11 Q. She can.
 12 (The last question was read back by the
 13 Reporter.)
 14 A. My guidance was if they want to talk to
 15 us, they can contact us. That was my guidance.
 16 Q. Just to be clear, did you give him any
 17 guidance that he should not contact the PointCare
 18 board?
 19 A. Yes.
 20 Q. What was your guidance to him on that?
 21 A. He can't contact the PointCare board.
 22 Q. Why not?
 23 A. Frank Matuszak contact?
 24 Q. Right.
 25 A. Because, you know, it would be against

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1 R. DePIANO - 4/2/08
 2 said he was talking to the financial person in the
 3 company.
 4 Q. So Mr. Matuszak told you that Dan O'Connor
 5 was talking to the PointCare comptroller, Eric
 6 Newman, right?
 7 A. Yeah, I believe that was the name, yeah.
 8 Q. And Mr. Matuszak told you that
 9 Mr. O'Connor was passing along to Mr. Matuszak
 10 financial information that Mr. O'Connor was
 11 obtaining from the comptroller, Newman, correct?
 12 A. In substance, yes.
 13 Q. Did Mr. Matuszak pass along any of that
 14 financial information he had obtained from O'Connor?
 15 A. There's some e-mails he sent me, but I
 16 don't remember a lot of what was in them other than
 17 that merger thing.
 18 Q. So Mr. Matuszak forwarded you e-mails that
 19 had PointCare financial information that O'Connor
 20 had obtained from the comptroller, Newman; is that
 21 right?
 22 A. There may have been statements regarding
 23 financial information. No financial statements were
 24 sent to me.
 25 Q. I don't mean the financial statements in

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1 R. DePIANO - 4/2/08
 2 what I wanted in the company. It's going against my
 3 policy.
 4 Q. Is there any other reason why it would be
 5 inappropriate for Mr. Matuszak to contact the
 6 PointCare board?
 7 A. Inappropriate? I didn't think it would be
 8 his place to do that.
 9 Q. Now, did Mr. Matuszak tell you of any
 10 other information that Mr. O'Connor had passed along
 11 concerning PointCare other than what you've told us
 12 about?
 13 A. As I said, there may have been some other
 14 subjects, none of which I was paying much attention
 15 to, unfortunately. If I had known you were going to
 16 ask me a question, I would have paid attention.
 17 Q. Do you recall Mr. Matuszak mentioning that
 18 Mr. O'Connor had passed along some financial
 19 information about PointCare that Mr. O'Connor had
 20 obtained from PointCare?
 21 A. Financial information? What type of
 22 financial information?
 23 Q. Any kind.
 24 A. I remember him mentioning that Dan was
 25 talking to somebody in the company, and I think he

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1 R. DePIANO - 4/2/08
 2 the formal sense, but you have a memory that
 3 Mr. Matuszak sent you e-mails providing you with
 4 financial information that Mr. O'Connor had obtained
 5 from PointCare's comptroller, Eric Newman, right?
 6 A. I don't know if an e-mail would have
 7 specified this data was obtained by Dan O'Connor
 8 from Eric Newman. It may have been Dan O'Connor
 9 said something or Dan O'Connor indicated this. Now,
 10 the innuendo was where did he get it from.
 11 Q. And your understanding was that O'Connor
 12 was obtaining PointCare financial information from
 13 its comptroller, Eric Newman?
 14 A. Yes.
 15 Q. And did you give Mr. Matuszak any guidance
 16 as to whether or not he should be talking to
 17 Mr. O'Connor and accepting financial information
 18 that O'Connor claimed to have obtained from
 19 PointCare's comptroller?
 20 A. Did I give him any guidance with
 21 continuing?
 22 Q. Yes.
 23 A. No.
 24 Q. Did you have any problem with your head of
 25 sales speaking with a terminated PointCare employee

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1 **R. DePIANO - 4/2/08**
2 **in obtaining PointCare financial information from**
3 **its comptroller?**
4 MR. COSTANTINI: So far he hasn't said
5 "communicate." He said he sent e-mails.
6 MR. CAPLAN: I said "communicated"?
7 MR. COSTANTINI: You said "speaking." "Do
8 you have any problem with speaking." He hasn't
9 testified to speaking.
10 BY MR. CAPLAN:
11 **Q. Did you have any problem with**
12 **Mr. Matuszak, Drew's director of sales,**
13 **communicating with a former PointCare employee,**
14 **Mr. O'Connor, in obtaining financial information**
15 **that Mr. O'Connor had obtained from PointCare's**
16 **comptroller, Eric Newman?**
17 A. Basically, no, for the following reason.
18 In the contract there's a confidentiality clause
19 which states that we can speak with employees and
20 affiliates. Mr. O'Connor is a shareholder. And I
21 spoke to Frank about the fact that any information
22 Mr. O'Connor as an affiliate shares with him cannot
23 be communicated outside of our company. And that
24 was rigidly adhered to, that any information which
25 came into our company from a qualified source, we

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1 **R. DePIANO - 4/2/08**
2 from the comptroller. Mr. O'Connor was. So he was
3 the recipient. I never told him to stop. Just told
4 him it can't be shared anywhere.
5 **Q. Did you ever say to Mr. Matuszak in the**
6 **context of his conversations that O'Connor did not**
7 **strike you as the type of businessperson that he**
8 **should be affiliating himself with?**
9 A. No.
10 **Q. Did you think that to yourself?**
11 A. No. I had very little interest in
12 Mr. O'Connor. And I didn't believe that Frank was
13 affiliating with him by communicating with him.
14 It's a little different. My definition of
15 "affiliation" is little different than just
16 receiving correspondence periodically.
17 **Q. At the time, Drew had an ongoing contract**
18 **with PointCare, correct?**
19 A. Yes. Yes. Still.
20 **Q. And in the context of Drew's ongoing**
21 **business relationship with PointCare, did you have**
22 **any problem with Mr. Matuszak having ongoing**
23 **communications with a former PointCare employee**
24 **about various PointCare business and financial**
25 **matters?**

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1 **R. DePIANO - 4/2/08**
2 had to maintain under the terms of this agreement as
3 confidential and could not talk to third parties.
4 **Q. And that's what you said to Mr. Matuszak?**
5 A. Yes.
6 **Q. So you gave him your approval for him to**
7 **obtain PointCare financial information that**
8 **Mr. O'Connor was obtaining from the comptroller,**
9 **Eric Newman?**
10 A. I didn't say I gave my approval. I
11 explained to him under the conditions under which
12 this contract functioned. The confidentiality
13 agreement allowed an affiliate to speak to us.
14 **Q. That's not my question.**
15 **My question is: Did you express to**
16 **Mr. Matuszak approval or disapproval of his**
17 **obtaining PointCare financial information that**
18 **Mr. O'Connor was obtaining from PointCare's**
19 **comptroller, Eric Newman?**
20 A. Neither approval nor disapproval.
21 **Q. When Mr. Matuszak made you aware that**
22 **O'Connor was passing along PointCare financial**
23 **information obtained from PointCare's comptroller,**
24 **did you tell Mr. Matuszak to stop it?**
25 A. No. He wasn't getting the information

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1 **R. DePIANO - 4/2/08**
2 A. Former employees, I would have. But with
3 regard to Dan O'Connor, he was a shareholder; and as
4 such, I didn't have any problem with him talking
5 with a shareholder.
6 **Q. Did you know that Mr. O'Connor had been**
7 **the head of sales at PointCare?**
8 A. Yes. He was the person I met at dinner.
9 Yes.
10 **Q. And you understood that as the head of**
11 **sales, he would, through the course of his**
12 **employment, have become privy to confidential**
13 **PointCare business information?**
14 A. I don't personally know whether he did,
15 but I assumed he would have.
16 **Q. Fair to assume that the person who's in**
17 **charge of sales at PointCare would have knowledge of**
18 **confidential business information of the company?**
19 A. Good assumption, yes.
20 **Q. And did you ever give Mr. Matuszak**
21 **guidance to be careful not to obtain from**
22 **Mr. O'Connor any confidential PointCare information**
23 **that Mr. O'Connor may have obtained in the course of**
24 **his employment at PointCare?**
25 A. No. All I cautioned Mr. Matuszak is to

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1 R. DePIANO - 4/2/08
 2 make sure he doesn't give any confidential
 3 information out about Drew to Mr. O'Connor.
 4 **Q. Why was that a concern to you?**
 5 A. Because Frank was under the control of
 6 Drew via Escalon, we're a public company, and
 7 literally our rules applied to our employees. And
 8 that was it.
 9 **Q. When Mr. Matuszak -- if he were to leave**
 10 **Drew's employment, would you have a problem with him**
 11 **divulging company confidential information after he**
 12 **leaves?**
 13 A. I would probably have a problem with him
 14 doing that.
 15 **Q. And another hypothetical.**
 16 **If he were to leave the company and Petra**
 17 **Krauledat, for example, were to call him and ask him**
 18 **for Drew confidential information, and he were to**
 19 **pass that along, would you have a problem with their**
 20 **doing that?**
 21 A. Would I have a problem?
 22 **Q. Let me -- yeah.**
 23 A. Of course I would have a problem if he did
 24 that, knowing full well that our rules and
 25 regulations of employment with him and the contract

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 2 wouldn't have a problem with Petra. Not that Petra
 3 would do that, but that's besides the point.
 4 **Q. I didn't mean to pick on Petra in my**
 5 **hypothetical.**
 6 **Did Mr. Matuszak ever mention whether he**
 7 **had any discussions with Mr. O'Connor about the**
 8 **possibility of Mr. O'Connor being compensated for**
 9 **any of these -- in connection with the possible**
 10 **transaction with PointCare?**
 11 A. Compensated for a potential transaction
 12 with PointCare.
 13 **Q. Compensated in connection with the**
 14 **transaction.**
 15 **So did he ever say if a deal goes through,**
 16 **O'Connor is looking to get paid such-and-such,**
 17 **anything to that effect?**
 18 A. By "deal," what do you mean specifically?
 19 MR. COSTANTINI: Are you talking about the
 20 merger possibility?
 21 MR. CAPLAN: Yes.
 22 A. Merger? No, I had no knowledge that Dan
 23 would ever be compensated for a merger.
 24 **Q. Did you ever have any discussions with**
 25 **Mr. Matuszak about the possibility of Mr. O'Connor**

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 2 he had prohibited that, yes.
 3 **Q. And you understand, based on your**
 4 **experience as a businessman, that companies like**
 5 **PointCare typically have similar confidentiality**
 6 **agreements with their employees?**
 7 A. I can only assume, rather than have full
 8 knowledge, but wouldn't that be under the -- her
 9 auspices or the management of PointCare to control
 10 the people that, you know, they have. Just like
 11 if -- in your example if Frank told PointCare's
 12 management anything that was confidential, my
 13 problem would be with Frank, not with PointCare.
 14 **Q. So you'd have no problem if Frank Matuszak**
 15 **were to leave the company and he'd called up Petra**
 16 **to spill some company secrets, you'd have no problem**
 17 **with her listening and taking in that information?**
 18 A. How can I control her? I can't control
 19 her. I mean, it's way beyond my ability to say to
 20 Petra stop listening if Frank calls her.
 21 **Q. And if Petra kept up the dialogue and kept**
 22 **in touch with Frank and obtained information, would**
 23 **you have any problem with her doing that in this**
 24 **hypothetical?**
 25 A. I would have a problem with Frank. I

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1 R. DePIANO - 4/2/08
 2 **being compensated in connection with any of the**
 3 **matters he was discussing with Mr. Matuszak?**
 4 A. Yes.
 5 **Q. What were you told about that?**
 6 A. If O'Connor was free to come to work with
 7 us, he would naturally be compensated for any
 8 services he provided.
 9 **Q. Did Mr. Matuszak tell you that he had**
 10 **discussions with Mr. O'Connor about the possibility**
 11 **of Mr. O'Connor coming on board at Drew or Escalon?**
 12 A. I think it was in one of the e-mails, but
 13 I don't believe Mr. O'Connor accepted any such
 14 arrangement. The possibility was in the e-mail of
 15 him, if he was able to, but I don't think he was
 16 interested.
 17 **Q. So did someone on behalf of Drew or**
 18 **Escalon tell Mr. O'Connor about a possible position**
 19 **for him at the company?**
 20 A. Other than Frank's e-mail?
 21 **Q. That's what I'm asking.**
 22 **So you're telling me that Frank sent an**
 23 **e-mail to O'Connor about a possible position for**
 24 **O'Connor at the company?**
 25 A. I don't remember the exact words, but it

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2 Q. Do you accept that Drew has responsibility
3 for any of the problems that the HT project
4 experienced after May of 2007?

5 A. No, I don't.

6 Q. Do you recall in the early December of
7 2007 time frame that Drew informed PointCare that
8 the HT instrument was ready to be delivered for
9 PointCare?

10 A. Right.

11 Q. And do you recall PointCare's response?

12 A. I think they indicated they weren't going
13 to be available. Their lawyer wrote back or
14 somebody wrote back saying that they weren't
15 available to do anything with it for several weeks.

16 Q. Do you recall that PointCare asked Drew to
17 provide PointCare with Drew's underlying test data
18 that showed that the instrument was complete?

19 A. Yes.

20 Q. And did you talk about that request with
21 your people?

22 A. I believe our people had brought in an
23 expert to support whether or not they were ready or
24 not.

25 Q. Did Drew provide PointCare with the

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2 underlying test data that PointCare requested in
3 connection with Drew's request to send the
4 instrument along to PointCare?

5 A. I think they submitted a report from the
6 consultant. I don't know if they submitted the
7 other information.

8 Q. Do you recall that PointCare asked for the
9 underlying test data beyond Dr. Chow's report?

10 A. We believed that was just another stalling
11 tactic on the part of PointCare.

12 MR. COSTANTINI: Could I have the question
13 back, please.

14 (The last question was read back by the
15 Reporter.)

16 A. Yes.

17 Q. Did Drew have documentation of underlying
18 test data supporting Drew's position that Drew's
19 work on the HT instrument was finished?

20 A. I personally did not see that data.

21 Q. Do you know if it existed?

22 A. No, I don't know if it existed.

23 Q. You understand that Drew is an
24 FDA-regulated company?

25 A. Yes.

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2 Q. And you understand that PointCare is an
3 FDA-regulated company, correct?

4 A. I assume they are.

5 Q. And you understand that the HT was an
6 FDA-regulated product?

7 A. Yes.

8 Q. And do you understand, at least in general
9 terms, that it is an FDA requirement for companies
10 to keep detailed records of their development
11 process of an instrument in order to get FDA
12 approval for it?

13 A. Yes.

14 Q. And it's an FDA requirement for companies
15 like Drew to keep formal records of its testing in
16 order to submit that for FDA approval, correct?

17 A. Yes.

18 Q. And did you understand that those were the
19 type of records that Dr. Hansen wanted to see before
20 moving forward with further steps on the HT?

21 A. I understand that Dr. Hansen was using
22 whatever excuse he could -- because we couldn't test
23 the machine without the software and without their
24 basic help to do it. And --

25 Q. You can keep going, but you're not

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2 answering my question, sir.

3 A. Okay. Repeat your question.

4 MR. COSTANTINI: It's only fair. Your
5 partner didn't answer my questions three times
6 when I asked "What is the basis in the contract
7 for that request?"

8 THE WITNESS: Repeat the question.

9 (The last question was read back by the
10 Reporter.)

11 A. I was told that's what he wanted.

12 Q. Did Drew have those records?

13 A. I have no idea. If it was an FDA
14 requirement, we probably have them, because we're
15 compliant.

16 Q. Do you have any personal knowledge whether
17 or not Drew had those FDA-required records for the
18 HT development process?

19 A. I said no, I don't.

20 Q. Was there any reason why Drew would not
21 provide such FDA-required records to Dr. Hansen in
22 response to his request?

23 A. Do I know of why we wouldn't?

24 Q. Well, let me ask you this.

25 Were you involved in Drew's decision not

<p style="text-align: right;">Page 270</p> <p>1 R. DePIANO - 4/2/08</p> <p>2 ready for delivery by the week of December 10."</p> <p>3 A. Yes.</p> <p>4 Q. Who told you that the HT's platform met</p> <p>5 specifications at that time?</p> <p>6 A. Doug and Gary.</p> <p>7 Q. And were they basing that on Dr. Chow's</p> <p>8 testing?</p> <p>9 A. I don't know.</p> <p>10 Q. As we sit here today, do you know whether</p> <p>11 this is an accurate statement to say that the HT met</p> <p>12 specifications?</p> <p>13 A. I believed it was an accurate statement.</p> <p>14 Q. Aside from belief, do you know whether it</p> <p>15 was accurate at the time?</p> <p>16 A. Did I personally go down and measure the</p> <p>17 instrument? I don't know how to do that and come up</p> <p>18 with the specifications. As I said, I'm not</p> <p>19 technical. So I run a company, I have people report</p> <p>20 to me, and those individuals informed me that it met</p> <p>21 specifications. Period.</p> <p>22 Q. Who told you that?</p> <p>23 A. Same people I mentioned before. Doug and</p> <p>24 Gary and their team.</p> <p>25 Q. If you could, if you don't mind flipping</p>	<p style="text-align: right;">Page 271</p> <p>1 R. DePIANO - 4/2/08</p> <p>2 to tab B of your affidavit.</p> <p>3 Actually, before I get there, one other</p> <p>4 question.</p> <p>5 Did Drew ever stop work on the HT?</p> <p>6 A. No idea.</p> <p>7 Q. Okay.</p> <p>8 MR. COSTANTINI: You mean Exhibit B?</p> <p>9 BY MR. CAPLAN:</p> <p>10 Q. Exhibit B in your affidavit.</p> <p>11 Is that a letter that you sent to Petra</p> <p>12 Krauledat on October 3, 2007?</p> <p>13 A. Tell you in a minute.</p> <p>14 Yes. Yes, it is.</p> <p>15 Q. If I can ask you to please turn to the</p> <p>16 third page of the document.</p> <p>17 A. (Witness complies.)</p> <p>18 Q. I apologize. Let's back up. On the</p> <p>19 second page. Put it in reverse.</p> <p>20 Do you see in the middle of the page</p> <p>21 there's an issue 3?</p> <p>22 A. Yes.</p> <p>23 Q. And you wrote to Dr. Krauledat that you</p> <p>24 were gratified to hear that PointCare has achieved</p> <p>25 satisfactory clinical results with manual sample</p>
<p style="text-align: right;">Page 272</p> <p>1 R. DePIANO - 4/2/08</p> <p>2 preparation, and you asked her, quote, "Could you</p> <p>3 please forward the supporting data to Frank,"</p> <p>4 question mark, end quote.</p> <p>5 Why did you ask Petra Krauledat to provide</p> <p>6 Frank with the supporting data showing satisfactory</p> <p>7 clinical results on the assay?</p> <p>8 A. Because I think Frank had indicated to me</p> <p>9 in the past that we were still waiting for -- we</p> <p>10 thought that those -- the information that was</p> <p>11 submitted from the manual, clinical, the first</p> <p>12 results were preliminary, and we were asking for the</p> <p>13 final data.</p> <p>14 Q. And why did Drew or Escalon want PointCare</p> <p>15 to provide it with the final testing data showing</p> <p>16 that its assay had passed testing?</p> <p>17 A. I believe at the time I was told that the</p> <p>18 reason we wanted it was for FDA reasons.</p> <p>19 Q. And did you think that it was reasonable</p> <p>20 to ask PointCare for that documentation?</p> <p>21 A. I didn't think it was unreasonable.</p> <p>22 Q. And in the context of developing an</p> <p>23 FDA-compliant instrument, it's reasonable to ask a</p> <p>24 business partner to provide underlying written test</p> <p>25 data documentation that supports its assertion that</p>	<p style="text-align: right;">Page 273</p> <p>1 R. DePIANO - 4/2/08</p> <p>2 tests have been passed.</p> <p>3 Would you agree with that?</p> <p>4 A. It's reasonable to assume that.</p> <p>5 Q. And you understood when you asked</p> <p>6 PointCare to supply the underlying test data showing</p> <p>7 that the tests had proven satisfactory, Drew had a</p> <p>8 legitimate business purpose for asking for that</p> <p>9 information?</p> <p>10 A. I believe they did.</p> <p>11 Q. Moving right along to page 4 of the same</p> <p>12 letter.</p> <p>13 MR. COSTANTINI: What issue are you on?</p> <p>14 MR. CAPLAN: I'm on the carryover</p> <p>15 paragraph from page 3.</p> <p>16 I'll just read into the record to try to</p> <p>17 move it along a bit.</p> <p>18 BY MR. CAPLAN:</p> <p>19 Q. The last sentence of that paragraph --</p> <p>20 I'll wait until you have the page in front of you.</p> <p>21 Do you see there's a carryover paragraph</p> <p>22 on page 4 that ends with the words "up its</p> <p>23 manufacturing issues"?</p> <p>24 A. Uh-huh.</p> <p>25 Q. Okay. And then a couple sentences down,</p>

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R. DePIANO - 4/2/08

1 Q. How much time did you spend reviewing
2 documents to satisfy yourself about the accuracy of
3 your affidavit before you submitted it?

4 A. I didn't spend a continuous amount of
5 time, so -- I get interrupted quite a bit during my
6 day, so I don't -- I didn't keep -- ever since I
7 left public accounting, I don't keep time records
8 anymore.

9 Q. I'm jealous.

10 A. I don't bill, either, by the hour, so ...

11 Q. Fair to say that for most part you relied
12 on information provided to you by subordinates in
13 presenting this affidavit to the Court?

14 A. A lot of what I did was communicate with
15 subordinates and rely on information contained in
16 the supporting documentation and conversations with
17 people.

18 Q. Now, do you contend that PointCare has
19 violated any confidentiality obligations under the
20 parties' agreement?

21 A. We believe that -- we have -- or I have
22 suspicions that the information gained as part of
23 working with us to solve some of the problems in our
24 situation by PointCare may have been shared with
25

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R. DePIANO - 4/2/08

1 title.

2 A. Yeah. S-U-R-E. Or "Optisure" or
3 something like that.

4 Q. What information did you see PointCare
5 sharing with that company?

6 A. The documents I've seen were financial
7 projections with Drew, without Drew, things of that
8 nature.

9 Q. Now, do you understand in the context of
10 the business relationship between Drew and PointCare
11 that each side's testing data and FDA documentation
12 are subject to confidentiality under the parties'
13 confidentiality agreement?

14 A. The testing data?

15 Q. Yes.

16 A. No. Because I think we have to share it
17 with the FDA, so it can't be that confidential.

18 Q. Fair enough.

19 Well, when those documents are submitted
20 to the FDA, is it your understanding that they are
21 part of the public record?

22 A. I really don't know the answer to that.
23 My assumption is any government agency, once you
24 give them something, is, as -- you know, public can
25

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R. DePIANO - 4/2/08

1 other parties.

2 Q. You suspect it may have been shared.

3 Do you have any anything more solid than
4 suspecting it may have been shared?

5 A. No. Just ...

6 MR. COSTANTINI: Do you recall this is the
7 C2 testimony we spent some time on before? I'm
8 not sure --

9 BY MR. CAPLAN:

10 Q. Other than that, do you claim that
11 PointCare has breached its contractual
12 confidentiality obligations in any other respects?

13 A. After being made aware of certain
14 discovery information, I believe they talked to
15 another company without our permission, and I don't
16 know what was disclosed to that company about us,
17 but I did see there were projections, and that
18 information would have been confidential, so I think
19 they breached it in terms of sharing it with another
20 party.

21 Q. With whom?

22 A. Some kind of "sure." I forget the name of
23 the company.

24 Q. The company with the word "sure" in the
25

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R. DePIANO - 4/2/08

1 access unless there's some rule that says they
2 can't. I don't know.

3 Q. Fair to say that your opinion or your
4 evaluation of PointCare has been changed since
5 you've seen documents that have been generated in
6 discovery in this lawsuit?

7 A. Absolutely.

8 Q. And what have you seen that changed your
9 view?

10 A. Many, many documents. A lot read,
11 e-mails, correspondence.

12 Q. In substance, what have you learned that's
13 led you to form your view of PointCare? Could you
14 describe to us.

15 A. That in my belief that there was an
16 intentional -- it was -- PointCare intentionally
17 decided to sabotage this project to make sure that
18 the machine would never work so that they can get
19 out of our contract and move on with what they
20 needed to do for them to survive.

21 Q. And why do you think PointCare wanted to
22 get out of this contract?

23 A. I think because it would have inhibited
24 the value that they needed to create for themselves
25

Exhibit D

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 DREW SCIENTIFIC, INC.,
6 Plaintiff, Case No. 08 CV 1490-AKH
7 -vs-
8 POINTCARE TECHNOLOGIES, INC.,
9 Defendants.
10 -----X

11 DEPOSITION OF FRANCIS MATUSZAK
12 New York, New York
13 March 28, 2008
14
15
16
17
18
19
20

21 Reported by:
22 Bonnie Pruszynski, RMR
23 JOB NO. 15874
24
25

Page 2

March 28, 2008
8:30 a.m.

Deposition of FRANCIS MATUSZAK, held
at DUANE MORRIS, LLP, 1540 Broadway, New
York, New York, before Bonnie Pruszynski,
Registered Professional Reporter, Registered
Merit Reporter, Certified LiveNote Reporter,
and a Notary Public of the State of New
York.

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Page 3

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BY: ANDREW F. CAPLAN, ESQ.
ALSO PRESENT: PETRA KRAULEDAT, Ph.D.

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(Witness sworn.)
FRANCIS MATUSZAK,
called as a witness, having been first
duly sworn, was examined and testified
as follows:
EXAMINATION
BY MR. CAPLAN:
Q Good morning.
A Good morning.
How are you?
Q Good, thanks.
We spent the last several days
together.
A Yes, we have.
Q All right. For the record, I am
Andrew Caplan. I represent PointCare in this
lawsuit brought by Drew Scientific.
Could you please state your name and
spell it for the record, please?
A Francis, F-R-A-N-C-I-S, Matuszak,
M-A-T-U-S-Z-A-K.
Q I share with you the same ground
rules you have heard day after day for
depositions.

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F. Matuszak
You can see that the court reporter
is typing down everything we are saying. If you
could please do your best to let me finish my
questions before you answer, I will do my best to
let you finish your answers before I start my next
question.
Fair enough?
A Yes, it is.
Q If my questions are confusing or
don't make sense, let me know and I will try
better.
A Okay.
Q Otherwise, if you answer the
questions, we will have to assume you understood
the questions. If you need a break, let me know,
except if a question is pending, I would
appreciate an answer, then we can take a break.
A Sure.
Q What did you do to prepare for your
deposition today, sir?
A I reviewed e-mails that I sent, that
I received, a binder prepared by Duane Morris. I
reviewed some of my files on my computer; so,
basically, expense reports.

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1 F. Matuszak

2 PointCare?

3 A We met with Dan O'Connor, and we
4 meaning, the first meeting was with Roger Borray
5 and Dan O'Connor. I was not involved in it.6 I think subsequent, during that week,
7 we came to meet Petra Krauledat and Peter Hansen,
8 and I believe our meeting was Roger Borray from
9 Drew, Harry Rimmer and myself.

10 MR. COSTANTINI: Off the record.

11 (Discussion held off the record.)

12 BY MR. CAPLAN:

13 Q At the time of the Medica conference,
14 what was Roger Borray's position at Drew?

15 A I don't know his exact title.

16 Q What was his area?

17 MR. COSTANTINI: You mean what
18 function did he perform?

19 Q Sure.

20 A I would say the best wording would be
21 business development.22 Q So, you permanently met with Peter,
23 Petra and Harry Rimmer and yourself at Medica?

24 A Yes.

25 Q Anyone else at the meeting?

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1 F. Matuszak

2 A Can you repeat the names?

3 Q Krauledat, Hansen, Rimmer, Matuszak.

4 A And Roger Borray. I can't be certain
5 whether or not Dan O'Connor was there. I believe
6 he was not.

7 Q What was the purpose of this meeting?

8 A Dan O'Connor had said the purpose of
9 the meeting to be that this company, PointCare,
10 was looking for a quick -- an instrument to bring
11 in quickly to the market to do CD4, CD4 percent
12 measurement.

13 Q And who was Mr. O'Connor at the time?

14 A He worked at PointCare. Yes, he did.

15 Q What was his title or function?

16 A I think it was business development.

17 Q Did he explain to you or was it
18 explained at this meeting why PointCare was
19 looking to quickly bring an instrument to the
20 market?21 A I don't know if that was expressed in
22 the first sets of meetings.23 Q Well, when he said that PointCare was
24 looking to quickly bring an instrument to the

25 market, did you understand what the urgency was?

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1 F. Matuszak

2 A The urgency as it pertains to what?

3 Q To why it was urgent for them.

4 MR. COSTANTINI: He didn't say it was
5 urgent. He said they wanted to do it
6 quickly, that is different from urgently.7 Q Did you understand why they wanted to
8 get a product to the market quickly?9 A I don't think at the initial meetings
10 that that was expressed to us.11 Q Was it explained to you at some
12 point?

13 A Yes.

14 Q What was the explanation given?

15 A The explanation was that PointCare
16 had a handshake agreement with Idexx Laboratories,
17 and that Idexx Laboratories was significantly
18 increasing their price to PointCare.

19 Q Connect the dots. So why did that --

20 A The price increase, as we were told
21 from PointCare, was unacceptable in their point of
22 view and, therefore, they needed to look for
23 alternate suppliers.24 Q And they needed an alternate supplier
25 quickly?

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1 F. Matuszak

2 A Yes.

3 Q Who explained that to you?

4 A I think all three, Dan O'Connor,
5 Petra Krauledat and Peter Hansen at various times.6 Q At various times prior to the parties
7 signing their written agreement?

8 A Yes.

9 Q So, prior to signing the agreement,
10 at various times O'Connor, Krauledat and Hansen
11 explained to you that PointCare needed to find a
12 new supplier, who could help them quickly get an
13 instrument to market; correct?

14 A Yes.

15 Q They did express that it was of some
16 urgency to PointCare to enter a relationship with
17 a supplier who could get an instrument to market
18 quickly; correct?

19 A Yes.

20 Q And before signing the contract with
21 PointCare, you understood that getting a new
22 instrument to market quickly was important to
23 PointCare?

24 A Yes.

25 Q That was one of the reasons that they

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1 **F. Matuszak**
2 **were signing the contract with Drew?**
3 **A** That was not evident when the
4 contract was signed, given the time frame that it
5 took to execute the agreement.
6 **Q** You understood, from your discussions
7 leading to the signing of a contract, that
8 PointCare's objective was to contract with a
9 supplier who would help them quickly get a product
10 to market; correct?
11 **A** Can you repeat the question?
12 **Q** No.
13 (Record read.)
14 **A** Can you rephrase that?
15 **Q** I will try. Fair enough.
16 You understood -- strike that.
17 Prior to signing a written agreement
18 with PointCare, you understood from discussions
19 with Dan O'Connor, Peter Hansen and Petra
20 Krauledat that PointCare's objective in reaching
21 an agreement with a new supplier was to quickly
22 get a new instrument to market; correct?
23 **A** Yes. However, as I mentioned, given
24 the time that it took to negotiate the agreement,
25 that did not become -- that time frame became less
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1 **F. Matuszak**
2 **could quickly get a new product to market. When**
3 **they told you that, what did you say Drew could do**
4 **for them in that regard?**
5 **MR. COSTANTINI:** If I might suggest
6 you broaden your question. He might not
7 necessarily have been, the speaker,
8 Mr. Rimmer might have been within his
9 hearing. If you want what he said, fine; if
10 you want what anyone from the Drew side
11 said, which I suspect is your real
12 objectives. I would suggest broadening it a
13 little.
14 **Q** I will broaden it as Tony suggests.
15 **So, on the various occasions that O'Connor, Hansen**
16 **and Krauledat told you and your colleagues that**
17 **PointCare's objective in signing a new agreement**
18 **was to quickly get a product to market, what did**
19 **you or your colleagues say in response?**
20 **A** I think basically what we said is we
21 would be happy to work with you towards that end.
22 **Q** Did you or your colleagues tell
23 PointCare that Drew was capable of working with
24 them to quickly get a new instrument to market?
25 **A** I don't think we made any claims as
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1 **F. Matuszak**
2 **evident to us or that need.**
3 **Q** So, let's take it one step at a time.
4 **They told you that getting to market**
5 **quickly was their objective in signing the**
6 **contract; correct?**
7 **A** Yes.
8 **Q** And you concluded in your mind, based
9 upon the time of negotiations, that it may not
10 have been as urgent as they were telling you?
11 **Actually, I withdraw the question.**
12 **So, they told you during contract**
13 **negotiations -- strike that.**
14 **When O'Connor, Hansen and Krauledat**
15 **told you and your colleagues during contract**
16 **negotiations that they wanted to sign an agreement**
17 **with a supplier who could help them quickly get a**
18 **product to market, did you and your counterpart**
19 **tell PointCare that Drew could deliver that?**
20 **A** I have no direct knowledge of express
21 time frame as to, you know, how long is quickly.
22 Could be one week, two months, three months.
23 **Q** Well, you have testified that each of
24 O'Connor, Hansen and Krauledat told you on various
25 occasions that PointCare needed a supplier who
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1 **F. Matuszak**
2 **to quickly or a time frame that I can recall.**
3 **Q** So, you were present on -- you were
4 present when O'Connor, Hansen and Krauledat said
5 that they needed to get a product quickly to
6 market and no one told them Drew was capable of
7 doing that to your knowledge?
8 **A** I think that was a determination made
9 by PointCare whether or not we could do it.
10 **Q** My question is -- strike that.
11 **During these discussions with**
12 **PointCare, did you reach a conclusion in your mind**
13 **that this was a relationship that was worth**
14 **pursuing?**
15 **A** Yes, I believe by the fact that we
16 executed the agreement.
17 **Q** And, so, your future business
18 collaborator, for lack of a better word, its three
19 senior executives are stating in your presence
20 that they needed Drew to help them to quickly get
21 a product to market, and it's your testimony that
22 no one at Drew told them that Drew had the
23 capability to do that?
24 **A** Again, I think, during the time from
25 Medica to when the agreement was signed, Dr.
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1 F. Matuszak
 2 Hansen did some of the feasibility studies to see
 3 whether or not the system would be capable of
 4 working with -- with the technology that PointCare
 5 had.
 6 **Q** You are not answering my question,
 7 sir. I asked you about Drew's response when these
 8 three PointCare senior executives are stating that
 9 they need someone who can help them quickly get a
 10 product to market.
 11 **A** And I said that our answer was yes,
 12 we would be willing to work with you.
 13 **Q** Just to close the loop and we can
 14 move on. So, in your presence, when O'Connor,
 15 Krauledat and Hansen told you and your counterpart
 16 that they needed a business partner who could
 17 assist them to get a product quickly to market,
 18 the substance of Drew's response was, "we are
 19 willing to work with you"?
 20 **A** Yes.
 21 **Q** If we could back up, you started to
 22 tell me about the meeting with you and some
 23 colleagues and some folks from PointCare at
 24 Medica; and, according to my notes, the PointCare
 25 folks told you PointCare was looking for an
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1 F. Matuszak
 2 **Q** And that technical issue is not your
 3 area, fair to say?
 4 **A** Yeah. There is no way I could answer
 5 that, especially at the trade show.
 6 **Q** But it is fair to say that your area
 7 is sales?
 8 **A** Yes.
 9 **Q** So, was it of some interest to you if
 10 the technical folks could make this marriage work
 11 to have a new product to sell?
 12 **A** Yes.
 13 **Q** And just backing up, what products
 14 were you and your people selling at the time that
 15 PointCare came on your radar screen?
 16 **A** We were selling, at that time, the
 17 22, the hemoglobin A1C analyzer, the Hemovet.
 18 **Q** I am going to guess that is a
 19 veterinary product.
 20 **A** Yes.
 21 **MR. COSTANTINI:** How did you guess
 22 that?
 23 **A** The Evolution, which is another
 24 hematology analyzer, and the Excel 16 and 18,
 25 which were also hematology analyzers.
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1 F. Matuszak
 2 instrument to get quickly to market.
 3 **What are you and the folks from Drew**
 4 **telling to the folks from PointCare at this**
 5 **meeting?**
 6 **A** As I recall, it was probably a little
 7 bit about Drew's direction, Escalon's investment
 8 in Drew and the technical specifications
 9 surrounding the Excel 22.
 10 I am fairly certain that Roger Borray
 11 spent sometime with Peter Hansen discussing the
 12 22.
 13 **Q** And what is the short answer of what
 14 the Excel 22 was at the time?
 15 **A** It was a hematology analyzer.
 16 **Q** Is it fair to say that a general
 17 subject of discussion in Medica was the
 18 possibility of PointCare and Drew getting together
 19 so that -- to combine PointCare's assay with
 20 Drew's Excel 22 platform?
 21 **A** Yes.
 22 **Q** Part of the question on the table was
 23 will that combination work or can it be made to
 24 work?
 25 **A** Yes.
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1 F. Matuszak
 2 **Q** Just to try to move it along, I'm
 3 going to ask you a grossly oversimplified
 4 question, see if it works.
 5 **Can you tell me which of these were**
 6 **the bigger sellers and if any of them were more**
 7 **marginal?**
 8 **A** It terms of total dollar sales, the
 9 22 was probably the highest from a sales
 10 standpoint. The higher margin was the Hemovet.
 11 **Q** Were any of the other three products
 12 significant financially to Drew at that time?
 13 **A** Yeah, the A1C.
 14 **Q** How about the Evolution or the Excel
 15 16 or 18, were those significant financially to
 16 Drew at the time?
 17 **A** No.
 18 **Q** And the Excel 22, what was its
 19 market?
 20 **A** To small hospitals, physician office
 21 labs.
 22 **Q** Anything else?
 23 **A** That's it.
 24 **Q** For the Hemovet instrument the market
 25 was in the veterinary sphere?
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1 F. Matuszak
 2 Q What was your involvement from that
 3 point going forward?
 4 A I would say very limited.
 5 Q So, other technical folks were
 6 figuring out the technical issues?
 7 A Yes.
 8 Q That was Peter Hansen on our side?
 9 A Yes.
 10 Q And who on Drew's side?
 11 A Roger Borray.
 12 Q Based on what you heard at Medica,
 13 were you interested, did you see PointCare as
 14 providing an opportunity for your sales
 15 department?
 16 A I followed up after Medica to look at
 17 the opportunities.
 18 Q And what did you find out?
 19 A I generally thought that it would
 20 give us a sales advantage.
 21 Q What do you mean by "sales
 22 advantage"?
 23 A That we would be able to sell more
 24 hematology analyzers than our competitor.
 25 Q What was it about the potential
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1 F. Matuszak
 2 relationship with PointCare that led you to
 3 conclude that this would give you or give Drew a
 4 sales advantage?
 5 Let me ask it cleaner.
 6 What did PointCare bring to the table
 7 that you thought would help give Drew a sales
 8 advantage?
 9 A A test that could not normally be
 10 performed on a hematology analyzer easily.
 11 Q What was the test?
 12 A CD4, CD4 percent.
 13 Q Recognizing you are not a technical
 14 guy, what was your understanding of -- strike
 15 that.
 16 While you are not a technical guy,
 17 you understood that PointCare had a CD4 test?
 18 A Yes.
 19 Q Did you understand that was something
 20 that Peter Hansen had invented?
 21 A That's what we were told.
 22 Q Did you ever learn anything to the
 23 contrary?
 24 A I believe I have during the course of
 25 this legal process, but I can't confirm it for
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1 F. Matuszak
 2 sure.
 3 Q What have you learned in that regard?
 4 A I saw a document, through one of the
 5 many ones that have been shown, that PointCare
 6 applied for a patent and that it was rejected on
 7 prior art.
 8 Q The patent on what was rejected for
 9 prior art?
 10 A I believe it was around the CD4, but
 11 I don't -- that is the information I don't have.
 12 Q And this is a document you have seen
 13 that someone produced in the lawsuit?
 14 A Yes.
 15 Q At least at the time that PointCare
 16 and Drew were exploring a relationship, and you
 17 saw that PointCare's CD4 test could bring a sales
 18 advantage to Drew, at that time did you understand
 19 that PointCare's CD4 test was proprietary to them?
 20 A That's what we were told.
 21 Q And that was your understanding?
 22 A Well, if I have no other information
 23 to contradict that, yes, then that would be my
 24 understanding.
 25 Q My question is: Did you have any
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 2 information to contradict that.
 3 A No.
 4 MR. COSTANTINI: Off the record.
 5 (Discussion held off the record.)
 6 BY MR. CAPLAN:
 7 Q When you Drew and PointCare were
 8 considering entering a business relationship, did
 9 you think that the PointCare CD4 test involved
 10 some proprietary IP rights?
 11 A That's what PointCare expressed to
 12 us, yes.
 13 Q And that was always your
 14 understanding at all times, at least through the
 15 time this lawsuit was commenced?
 16 A Yes.
 17 Q So, throughout Drew's -- strike that.
 18 From the beginning of discussions --
 19 strike that.
 20 From at least early on in discussions
 21 between PointCare and Drew, and throughout the
 22 entire time of the parties' business relationship,
 23 you understood that PointCare owned the IP and its
 24 CD4 test; correct.
 25 A Yes.
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2 assumed.

3 Q So, can you explain --

4 A And we would have expected, and we
5 reminded Petra Krauledat several times that we
6 expected PointCare to abide by the distribution
7 agreement.8 Q But have you no specific memory of
9 replying to this alleged e-mail and telling her
10 you can't do that?11 A There were several replies, not maybe
12 specific to that e-mail, but there were several
13 replies, I think one in May, and then one around
14 that time frame, where we said we expect PointCare
15 to honor the terms of the co-marketing agreement.16 Q Are you aware of, yourself or any
17 colleague at Drew, responding to this alleged
18 e-mail from Dr. Krauledat and telling her you
19 can't do that, if you -- in substance, if you try
20 to line up distributors in Russia, you are
21 violating the contract?22 A There were several e-mails reminding,
23 again, Petra Krauledat.

24 Q That is a question and answer, sir.

25 My question is: Are there any e-mails responding

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2 to her e-mail telling her you can't do that?

3 MR. COSTANTINI: And he's telling you
4 yes.

5 MR. CAPLAN: No, he isn't.

6 Q You are telling me there were general
7 e-mails. Were any of these a response to this
8 e-mail of hers? That is my question.

9 A I can't be sure. I don't know.

10 Q Did you have any discussions with
11 colleagues at Drew about this e-mail from Dr.
12 Krauledat?

13 A Yes.

14 Q With whom did you discuss it?

15 MR. COSTANTINI: You can talk about
16 with whom you discussed it, if lawyers are
17 amongst them --18 A I believe it was Ken Pina, Doug
19 Nickols, possibly Richard DePiano, Jr.20 Q So, Pina, Nickols and maybe DePiano,
21 Jr., and yourself discussed this issue.22 A We discussed the general issue of the
23 fact that PointCare may not be agreeing or
24 complying with the terms of the agreement. And I
25 don't exactly know, when, what date that was.

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2 Q Was this a meeting?

3 A It would have been done by
4 teleconference.5 Q What -- do you recall the substance
6 of the conversation?7 MR. COSTANTINI: He isn't asking you
8 what the substance is. He's asking you if
9 you recall the substance.10 A I can't recall, but it would have
11 been regarding the fact that we believe that
12 PointCare was not honoring the co-marketing
13 agreement.

14 Q Is Mr. Pina an attorney?

15 A Yes.

16 MR. COSTANTINI: And Mr. DePiano, Jr.
17 is an attorney as well.18 Q Is Mr. Pina an attorney employed by
19 Drew, like does he work at Drew, or is he an
20 outside attorney?21 A He's in Escalon. He's retained by
22 Escalon.23 Q Let me ask this: Do you know what
24 Mr. Pina's job is at Escalon?

25 A He helped construct this agreement.

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2 So, he's -- I don't know. I don't know exactly
3 his title, but he's counsel, and Rich DePiano, Jr.
4 is general counsel.5 Q So, the DePiano in this discussion
6 was Junior?

7 A Yes.

8 Q So, you had a discussion with two
9 in-house counsels at Drew, and Mr. Nickols -- was
10 he the president of Drew at that time?

11 A Yes.

12 Q And yourself?

13 A Um-hum.

14 Q And you have no memory, one way or
15 the other, whether anyone responded to Dr.
16 Krauledat's e-mail and told her she was not
17 allowed to try to line up distributors in Russia;
18 is that right?19 A At that time, there were quite a few
20 e-mails going back between Petra Krauledat and
21 Rich DePiano, Sr. So there may very well have been
22 a response to that, but I don't recall it.

23 Q Fair enough.

24 A It's a timing -- there were so many
25 at that time.

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1 **F. Matuszak**
2 **goal in this project was to beat the NP to the**
3 **market?**
4 A With any instrument that comes to the
5 market, timing is critical. The sooner you can
6 bring a product to market, the more profits you
7 are going to make; that was my whole goal
8 surrounding that.
9 Q **So, it was critical to Drew to get**
10 **the HT to market as fast as possible; right?**
11 A Yes.
12 Q **And it was likewise critical to**
13 **PointCare for the HT to get to market as soon as**
14 **possible; right?**
15 A That's what they expressed to us,
16 yes.
17 Q **In that regard, the timeline, it was**
18 **critical to adhere as closely as possible to the**
19 **timeline in the contract; correct?**
20 A Yes.
21 Q **That's why timelines are put in**
22 **contracts; right?**
23 A Well, I have never seen a timeline
24 developed that way.
25 Q **That's why this timeline was put in**
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1 **F. Matuszak**
2 **the contract, reflecting both sides' intent that**
3 **it was critical to get this product to market in a**
4 **timely fashion; correct?**
5 MR. COSTANTINI: He's already told
6 you he didn't have anything to do with
7 making up the timeline, so he is he going to
8 know why it was put in in the manner it was
9 put in?
10 A Can you repeat the question?
11 (Record read.)
12 A Let me put the timeline in front of
13 me.
14 Q **Please take whatever time you need to**
15 **continue reviewing the timeline. Whenever you are**
16 **done, you can just look up.**
17 A Okay. I will.
18 Could you re-read the question again?
19 (Record read.)
20 A I don't know that I can answer that
21 one way or another, because timelines are
22 relative, as I mentioned.
23 I think I mentioned earlier, to one
24 person quick is, you know, two weeks, three weeks.
25 This is, you know, a longer period of time.
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1 **F. Matuszak**
2 **Is this relative, based on when this**
3 **agreement was signed and when this timeline was**
4 **developed, no one had an understanding as to how**
5 **long each one of these would actually take. So,**
6 **how could we make a determination of whether it**
7 **was going to be fast or slow?**
8 Q **Did you have an understanding that**
9 **this timeline was intended to reflect the time**
10 **that the project was supposed to take?**
11 A My understanding of this agreement,
12 or of this timeline, and based on the dates that I
13 see, is that there was, indeed, some feasibility
14 studies done early on and there was some time
15 expected times placed into the timeline, but there
16 was not enough initial information to guarantee
17 that these timelines would have been met.
18 Q **Did you understand, when this**
19 **contract was signed, that these deadlines in the**
20 **timeline were requirements of the contract?**
21 A That doesn't appear -- that is not my
22 understanding.
23 Q **Can we go back to the e-mail, Exhibit**
24 **2?**
25 **The first page of your e-mail to**
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1 **F. Matuszak**
2 **Mr. DePiano, Sr., do you see the second to the**
3 **last paragraph, where you start off, "our unit is**
4 **a few months away from shipping"?**
5 A Yes.
6 Q **What was your basis for saying that**
7 **on March 20th of '07?**
8 A Based on information that I received
9 during the sales meeting.
10 Q **From whom?**
11 A From, I believe, Petra Krauledat and
12 Peter Hansen, and the fact that we were going to
13 be shipping an instrument up to PointCare.
14 Q **When you wrote that Drew's unit --**
15 **strike that. "Our unit is a few months away from**
16 **shipping," were you relying on any information**
17 **from Drew?**
18 A Yes. That they were prepared to ship
19 an instrument up for testing.
20 Q **When you said "a few months away from**
21 **testing," were you referring to the shipping of a**
22 **single prototype instrument to PointCare, is that**
23 **what you are referring to?**
24 A Can you repeat the question?
25 (Record read.)
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1 F. Matuszak
 2 Rockingham.
 3 Q To your knowledge, did Drew want to
 4 get back an NP for any reason other than the sales
 5 and marketing reasons you have described to me?
 6 A For me, personally, because -- I
 7 wanted it for the sales.
 8 Q And, to your knowledge, did anyone
 9 else at Drew want it for any other purposes?
 10 A I can't recall.
 11 Q You kept in touch with Dan O'Connor
 12 after he left PointCare?
 13 A Yes.
 14 Q For what purpose?
 15 A Dan has a wealth of information
 16 around the industry and likes to talk, and anybody
 17 that likes to talk is valuable in terms of
 18 information for sales.
 19 Q Dan had loose lips?
 20 A Yes.
 21 Q And that was of interest to you in
 22 terms of keeping in touch with him?
 23 A Yes.
 24 Q And you also said he had a wealth of
 25 information. He had a wealth of information that
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1 F. Matuszak
 2 Mr. O'Connor was a shareholder it was fine for him
 3 to tell you anything and everything that he
 4 learned at PointCare, are you?
 5 A As it pertains to what?
 6 Q PointCare and confidential
 7 information he gained when he was head of sales at
 8 PointCare.
 9 A I don't think I could determine what
 10 was confidential and what was not.
 11 Q Well, you understood, when
 12 Mr. O'Connor left PointCare, that he had a duty to
 13 maintain the confidentiality of the PointCare
 14 information, didn't you?
 15 A I don't know what his agreement was
 16 with PointCare.
 17 Q You have already testified that,
 18 regardless of an agreement, you understand that
 19 employees and senior management of companies have
 20 an inherent duty to maintain the confidentiality
 21 of their company's business information; right?
 22 A Yes, of certain information.
 23 Q You understood that Mr. O'Connor,
 24 when he left PointCare, had a duty of
 25 confidentiality to PointCare; right?
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1 F. Matuszak
 2 he gained as head of sales at PointCare; right?
 3 A And prior. He has industry
 4 experience.
 5 Q And it was of interest to you if
 6 Mr. O'Connor and his loose lips would share
 7 PointCare internal information with you, wasn't
 8 it?
 9 MR. COSTANTINI: Object to the
 10 question.
 11 A If that happened to be delivered,
 12 yes. He was a shareholder, so, I would assume
 13 that he had -- he could discuss certain things.
 14 (Telephone interruption.)
 15 MR. COSTANTINI: Let's go off the
 16 record for just a moment.
 17 (Discussion held off the record.)
 18 BY MR. CAPLAN:
 19 Q Is it your understanding that a
 20 shareholder of a company has free reign to
 21 disclose any information about the company without
 22 restriction?
 23 A I am not sure I have any knowledge
 24 one way or the other regarding that.
 25 Q You are not suggesting simply because
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1 F. Matuszak
 2 A Yes, but as I mentioned before, I
 3 didn't know what was confidential and what was
 4 not. So, therefore, I couldn't make a decision
 5 for Dan to say -- he told me what he told me.
 6 Q Did you ever ask Mr. O'Connor to
 7 describe to you the terms of his confidentiality
 8 agreement at PointCare?
 9 A No.
 10 Q Did you ever ask Mr. O'Connor what he
 11 was allowed and not allowed to tell you in regard
 12 to PointCare confidential information?
 13 A No.
 14 Q So, you knew that he had duties of
 15 confidentiality. Did you make any inquiry to know
 16 what it was appropriate or not appropriate for him
 17 to share with you?
 18 A No.
 19 Q Did you ever say to Mr. O'Connor,
 20 "jeez, I don't think you should tell me that.
 21 That one sounds confidential"?
 22 A No.
 23 Q Whatever Mr. O'Connor was willing to
 24 tell you about PointCare information, you were
 25 willing to listen; right?
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1 F. Matuszak

2 Q And some of the PointCare information
3 that Mr. O'Connor disclosed to you after he left
4 PointCare, you passed that along to Rich DePiano,
5 Sr., right?

6 A I can't recall whether or not it was
7 privileged or not at the time we did that.

8 Q You mean you spoke to him, but the
9 lawyers may have been there?

10 A Yes.

11 Q Do you recall Mr. O'Connor feeding
12 you -- do you recall, after Mr. O'Connor left
13 PointCare, his feeding you information about
14 business deals that PointCare had had that might
15 be falling through that Drew might be able to
16 obtain for itself?

17 Do you remember receiving any of that
18 kind of information from Mr. O'Connor?

19 A As I mentioned earlier, that was my
20 intention, to not let business go away because
21 PointCare and O'Connor separated. Ultimately, it
22 would help both companies.

23 Q Maybe I wasn't clear.

24 My question was: Do you recall his
25 telling you about any deals that PointCare might

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1 F. Matuszak

2 be losing, that he claimed PointCare was losing
3 that Drew could get for itself?

4 Do you recall him feeding you any of
5 those inside scoops?

6 A Yes, I think so.

7 Q Tell me about it.

8 A I think the one major one was
9 around -- he had been working on a very large deal
10 for Abbott that had issues and that deal fell
11 through.

12 Q He had been working on that Abbott
13 deal on behalf of PointCare?

14 A Yes. And clearly the information
15 that he had was not going to be shared with
16 PointCare because they had no information around
17 it. And, again, my objective was to collect the
18 business for both companies, both would share in
19 the wealth.

20 If there was a poor relationship with
21 Dan and PointCare, there was no reason why we
22 still couldn't get the information.

23 Q So, you admit that Mr. O'Connor
24 tipped you off about PointCare allegedly losing a
25 deal with Abbott; right?

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1 F. Matuszak

2 MR. COSTANTINI: Object to the form
3 of the question.

4 MR. CAPLAN: I will unload the
5 question.

6 MR. COSTANTINI: "Admit to," come on.

7 A Well, no. We knew for a fact, before
8 Dan leaving, that the Abbott deal was lost. In
9 fact, I believe I also learned that information
10 prior to Dan leaving from Petra Krauledat. It was
11 based around the fact that there was in issue with
12 Abbott.

13 Q You are clear that it had completely
14 fallen through, not just that it was facing some
15 issues and that PointCare had a chance to
16 resurrect it?

17 A There was nothing indicated to me
18 that that was going to be resurrected.

19 Q Did you pursue that Abbott
20 opportunity on behalf of Drew?

21 A No, I have not.

22 Q And it's your testimony that if --
23 well, are you saying that you took in that
24 information with the intent of resurrecting it and
25 sharing some of it back with PointCare?

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2 A Well, yes. If we had gotten the
3 information that it was worthwhile, I would have.
4 Clearly, there was no real information that Dan
5 had. Dan, as I mentioned earlier, likes to talk,
6 so, half of the stuff that he tells you needs to
7 be weighted.

8 Q Do you recall having some discussions
9 with Mr. O'Connor about the possibility of getting
10 a direct line of communication to the PointCare
11 board in order to do some type of transaction
12 directly with PointCare?

13 A Yes.

14 Q And do recall talking with him about
15 trying to get a direct line of communication with
16 if board bypassing, the CEO, Petra Krauledat?

17 A Yes.

18 Q Tell me about that, those
19 discussions?

20 A Basically, he felt that the company
21 could make money. We talked a little about how
22 that might happen and then it went nothing further
23 than that.

24 Q He told you that he thought which
25 company could make money?

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1 F. Matuszak

2 A PointCare, or the technology around
3 PointCare.4 Q And what possible transaction did you
5 and he discuss? Strike that.6 What did you and he -- he told you he
7 thought PointCare could make money. Did you and
8 he discuss doing something about that?9 A Nothing more than just a few, you
10 know, this could be done if you wanted to do it
11 and we went no further than that.12 Q What is the "this" that you
13 considered could be done?

14 A Contacting the board directly.

15 Q For purposes of what?

16 A An acquisition.

17 Q And why were you discussing with him
18 going directly to the board of directors and not
19 going through the CEO, Petra Krauledat?20 A Because, clearly, in the past we
21 couldn't come to an agreement on the first
22 valuation, so there was no reason to believe that
23 we would be able to come to an agreement only a
24 few months after.

25 Q Were there any other reasons that you

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2 thought it was beneficial to bypass the CEO and go
3 directly to the board to discuss a possible
4 acquisition?5 A I can't recall. If you have
6 something to refresh my memory, I would be more
7 than happy to review it.8 Q And you talked about the possibility,
9 you spoke with Richard DePiano, Sr. about the
10 possibility of bypassing Dr. Krauledat and going
11 directly to the PointCare board; right?

12 A I don't recall.

13 Q Do you recall Mr. O'Connor asking you
14 to tell Rich DePiano, Sr. that you had first
15 approached Mr. O'Connor about these matters?

16 A I don't recall.

17 Q Do recall telling Mr. O'Connor that
18 you would have no problem telling Rich it was your
19 idea to approach Mr. O'Connor?

20 A Can you read that back?

21 (Record read.)

22 A I don't recall speaking to Dan
23 O'Connor one way or the other as to whether I
24 would talk to Rich about it or not.

25 Q Which of you came up with the idea of

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2 bypassing the CEO and going directly to
3 PointCare's board about the possibility of
4 acquiring them?

5 A I'm not sure. I don't recall.

6 Q Now, at the time of your discussions
7 with O'Connor, former PointCare sales manager,
8 Drew and PointCare were still operating under
9 their distribution, marketing and so forth
10 agreement regarding the HT and NP; right?

11 A Yes.

12 Q To your understanding, did Drew and
13 PointCare have a duty of good faith to each other
14 under that contract?15 A I don't know the legal implications
16 around that.17 Q From a layperson's perspective, did
18 you feel duty bound to act in good faith towards
19 PointCare during the parties' business dealings?20 A Yes. Which, in any of the
21 discussions that I believe that I had with Dan
22 regarding the Abbott deal, was in good faith as I
23 mentioned earlier.24 Q And do you, from your layperson's
25 prospective, think that you were acting in good

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1 F. Matuszak

2 faith when you spoke to him about the possibility
3 of bypassing PointCare's CEO and going directly to
4 the board of directors about acquiring the company?5 A If it was ultimately, yes, in
6 PointCare's benefit to -- to have a merger.7 Q So, in your view, were you acting in
8 good faith in talking to Mr. O'Connor about
9 bypassing their CEO on and entering direct merger
10 discussions with the board of directors?11 A I guess that would depend on whether
12 not it was acted upon.13 Q Well, my question to you -- was it
14 ever acted upon?

15 A No.

16 Q So, my question to you is: Did you
17 think you were acting in good faith just to
18 strategize and to talk about the possibility of
19 bypassing PointCare's CEO to directly approach
20 their board of directors about a transaction in
21 the context of the parties ongoing business
22 relationship?

23 A Can you read that back.

24 (Record read.)

25 A I think strategizing about it had no

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1 F. Matuszak
 2 reasoning, I believe, behind it.
 3 Q Did he ever tell you why he
 4 distrusted him?
 5 A I think it was a personal thing. It
 6 wasn't anything specific.
 7 Q Skipping along to the first page of
 8 this, that is a reply e-mail that you sent to Dan
 9 O'Connor later that morning, Saturday, July 14th?
 10 A Yes.
 11 Q And you told him, "I would have no
 12 problem telling Rich this was my idea to approach
 13 you."
 14 That is DePiano, Sr.?
 15 A Yes.
 16 Q So, you agreed to tell DePiano, Sr.
 17 it was your idea to approach O'Connor; right?
 18 A Yes. However, I'm not positive that
 19 I did to speak to Rich about this.
 20 Q When you agreed to tell Mr. DePiano
 21 that this was your idea to approach O'Connor, was
 22 that how it happened? Did you, in fact, approach
 23 O'Connor about this?
 24 MR. COSTANTINI: You mean approach
 25 DePiano about?

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1 F. Matuszak
 2 MR. CAPLAN: No. This one I actually
 3 got right.
 4 MR. COSTANTINI: Okay. I lost it
 5 someplace along the way.
 6 A I don't recall who mentioned it. I
 7 don't remember whether it was myself or Dan.
 8 (Matuszak Exhibit 4 marked for
 9 identification as of this date.)
 10 Q Mr. Matuszak, a couple of quick
 11 questions.
 12 Do you recognize that as an e-mail
 13 that you and Mr. O'Connor exchanged on July 18th,
 14 2007?
 15 A Yes.
 16 Q And do you see on the bottom you
 17 wrote to Mr. O'Connor, "Subject: Conversation
 18 with Rich. I spoke with Rich, and here is with
 19 where we stand"?
 20 Let me know when you finish reading
 21 it.
 22 A Yes, that's my e-mail.
 23 Q And does this e-mail refresh your
 24 recollection that you spoke with Rich DePiano, Sr.
 25 about these discussions between you and

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1 F. Matuszak
 2 Mr. O'Connor?
 3 A I don't recall actually having the
 4 conversation, but, obviously, I must have.
 5 Q And in your e-mail, when you wrote to
 6 O'Connor, "I spoke to Rich and here is where we
 7 stand," Rich is Rich DePiano, Sr., right?
 8 A Yes.
 9 Q What did you discuss with Rich
 10 DePiano, Sr. about this?
 11 A I don't remember the exact contents
 12 of the call.
 13 Q Do you remember the substance of it?
 14 A No.
 15 Q Did -- strike this.
 16 Was this the first time you had
 17 spoken to Mr. DePiano and passed along information
 18 that Mr. O'Connor gave you after he had left
 19 PointCare?
 20 MR. COSTANTINI: Did we establish
 21 when he left PointCare? That might help hip
 22 answer.
 23 A I don't recall, given the timeline,
 24 because it was, again, very close.
 25 Q What is your best recollection of

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1 F. Matuszak
 2 when Mr. O'Connor left PointCare?
 3 A I believe around June.
 4 Q You have a good memory.
 5 Why don't we work off of a working
 6 assumption that Mr. O'Connor left PointCare on or
 7 about June 5th of 2007?
 8 A Okay.
 9 MR. COSTANTINI: With that date in
 10 mind, are you going to reask your question?
 11 BY MR. CAPLAN:
 12 Q With that date in mind, we just
 13 looked at an e-mail on July 18th reflecting that
 14 you spoke with Richard DePiano, Sr. about your
 15 conversation with Mr. O'Connor concerning possibly
 16 going around the CEO and talking to the board of
 17 directors.
 18 So, my follow-up question is: Is
 19 that the first time you spoke with Mr. O'Connor
 20 and passed along -- I'm sorry.
 21 Is that the first time you spoke with
 22 Mr. DePiano, Sr. about information that
 23 Mr. O'Connor provided to you after he left
 24 PointCare?
 25 A To the best of my knowledge, I don't

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1 F. Matuszak
2 declared that he couldn't go to the board, the
3 discussions continued between you and
4 Mr. O'Connor; correct?

5 MR. COSTANTINI: Object to the form
6 of the question.

7 A Can you repeat the question?
8 (Record read.)

9 A I think Dan did still continue to
10 contact me, yes.

11 Q And you continued to discuss this
12 with him; right?

13 A I believe so.

14 Q And at the time, did you know who
15 Eric Newman was?

16 A Yes.

17 Q And who was he?

18 A I think he was the controller.

19 Q And you understood that the
20 controller handles the finances for PointCare?

21 A Yes.

22 Q And you understand that the
23 controller handles confidential financial
24 information for PointCare?

25 A Yes.

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2 Q And you understand that confidential
3 financial information is sensitive to a company
4 like PointCare?

5 A Yes.

6 Q And you understood that PointCare
7 would expect its financial information to be kept
8 confidential to it; correct?

9 A Yes.

10 Q And you understood that it would be
11 inappropriate for someone to contact PointCare's
12 controller to ask him financial information about
13 PointCare; right?

14 A It depends on the person asking the
15 question.

16 Q Someone who is, someone who is
17 outside of PointCare.

18 Let me ask you this: So, are you
19 suggesting that Mr. O'Connor, as a shareholder,
20 had a certain right to obtain certain financial
21 information from PointCare?

22 A Yes. And needed to hold or could
23 hold his -- basically, his investment, ask for
24 accountability.

25 Q So, Mr. O'Connor, in your mind, had

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1 F. Matuszak
2 certain rights to contact Eric Newman, controller,
3 to get confidential information because O'Connor
4 was a shareholder; right?

5 A Yes.

6 Q But, certainly, O'Connor did not have
7 the right to disclose any PointCare confidential
8 information from the controller to you at Drew;
9 right?

10 A Yes.

11 Q That would be wrong, wouldn't it?

12 A Yes.

13 Q And that happened; right?

14 A I believe Dan did send me some
15 information.

16 Q What did he send you?

17 A I don't recall exactly what it was.

18 Q But you recall that he sent you some
19 confidential financial information he had obtained
20 from Eric Newman, the controller of PointCare;
21 right?

22 A Yes.

23 Q What did you do with that
24 information.

25 A Privilege?

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2 MR. COSTANTINI: He's raising with me
3 a question about a possible privilege
4 assertion. So, let me go outside with him
5 for a second to see what this is about.

6 MR. CAPLAN: Okay, if you need to
7 confer about a privilege.

8 (Witness and his counsel conferring
9 outside the deposition room.)

10 MR. COSTANTINI: The problem is the
11 answer is going to be he advised counsel of
12 it and that is perfectly permissible for you
13 to learn.

14 What the discussion was subsequent to
15 that, is, you know, I think would be within
16 the privilege, but I will let him answer as
17 he was going to answer that he advised
18 counsel of it.

19 BY MR. CAPLAN:

20 Q Who is the counsel?

21 A To the best of my knowledge, it would
22 be Duane Morris.

23 Q Did you tell anyone at Drew the
24 confidential financial information that

25 Mr. O'Connor passed along to you from controller,

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1 F. Matuszak

2 Eric Newman?

3 A It would have been as one group.

4 Q Who was the group to whom you
5 reported the information?6 A Well, it would be everyone that was
7 in the conference call regarding the --

8 Q Okay.

9 A -- the PointCare matter. So it
10 was -- everyone was in.11 Q Who is the cast of characters? Who
12 is on this call?13 A I can't say for sure, but it would
14 be, more than likely, Doug Nickols, Rich DePiano,
15 possibly Ken Pina and Tony Costantini, and maybe
16 some others from Duane Morris.17 Q And not looking for exact dates, but
18 when in relation to -- strike that.19 When you received, what is your best
20 memory of when Mr. O'Connor passed along this
21 confidential financial PointCare information to
22 you?23 A I don't know what it is, so it would
24 be hard to say when.

25 Q Well, in the couple of years you have

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1 F. Matuszak

2 worked at Drew, have you often had occasion to
3 convene a group of senior management and someone
4 as august as Mr. Costantini to get advice of
5 counsel?6 A It would be around the time of the
7 lawsuit.

8 Q I guess that's what I was getting at.

9 Did you pass along this information
10 in or around the time you received it from
11 Mr. O'Connor or was it not until the lawsuit that
12 you passed it along?13 A I have -- I can't comment, because I
14 don't know when it was. I don't recall the time
15 frame.16 Q What, if anything, did you do with
17 it, aside from passing it along to this august
18 group, what, if anything, did you do with
19 PointCare's financial information?

20 A I don't recall.

21 Q When Mr. O'Connor passed that
22 information along to you, did you tell him, "it's
23 not right for you to give this to me"?

24 A No.

25 (Matuszak Exhibit 5 marked for

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1 F. Matuszak

2 identification as of this date.)

3 Q Showing you Exhibit 5, do you
4 recognize that as an e-mail that Doug Nickols sent
5 to you on December 14, '07 --

6 A Yes.

7 Q -- and a string of prior e-mails.

8 Could you please turn to the second
9 to last page. And, first, would you just agree
10 with me that that is the earliest in a string of
11 the e-mails; that is an e-mail that you sent to
12 Doug Nickols, December 13th, 2007?

13 A Yes.

14 Q The third line down, you say, "we
15 think the hardware is set."

16 Do you see that?

17 A Which?

18 Q We think the hardware is set, given
19 that we think the hardware is set.

20 A Yes.

21 Q The hardware you are referring to,
22 the HT?

23 A Yes.

24 Q And what did you mean when you said,
25 "we think the hardware is set"?

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1 F. Matuszak

2 A That all of the problems resulting
3 around the gold particle deposits, that we were
4 able to come to solutions and fix those problems.5 Q Were any and all problems with the HT
6 hardware fixed at this point to your knowledge?7 A Yes, I believe -- well, as best as we
8 can determine.9 Q And since are you not the technical
10 guy, did you figure that out or did someone tell
11 you that?12 A Somebody else basically conveyed to
13 me.14 Q Who is the technical person that told
15 you that?16 A Well, I think at this time we
17 probably would have gotten some data on -- from
18 Herb Chow, but I am not sure of the dates. But I
19 would have probably seen that and concluded that
20 things started looking, were starting to look
21 good.22 Q Do you consider within your expertise
23 to read Herb Chow's report and to interpret what
24 it's telling you?

25 A I mean, from some of my field

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1 F. Matuszak

2 engineering experience, I could read some of it
3 and say, okay. There are some conclusions that he
4 reached that, obviously, I could understand and
5 say, yeah, that looks good. The whole, the whole
6 piece of it; probably not.

7 **Q The last paragraph of that e-mail**
8 **that you wrote to Doug Nickols, you told him "just**
9 **keeping you up-to-date and, hopefully, PointCare**
10 **backs down."**

11 **What did that refer to?**

12 **A Well, by this time things had really**
13 **just blown up totally.**

14 **Q I was there.**

15 **A And, really, all we wanted to do was**
16 **get things moving, get things selling and,**
17 **hopefully, we could come to a mutual agreement,**
18 **and the relationship probably wouldn't be the way**
19 **it was, but at least we could start selling and**
20 **moving things along.**

21 **Q To your understanding, was Drew open**
22 **to the possibility of reaching a new, mutually**
23 **agreeable agreement at that time?**

24 **A At some point in that era, yes.**

25 **Q And then continuing on that sentence,**

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1 F. Matuszak

2 **you say, "hopefully PointCare backs down, but we**
3 **should, in the meantime, also find another**
4 **manufacturer of gold antibodies for CD4."**

5 **What did you mean there?**

6 **A We invested a lot of time in our**
7 **development of the HT, and if we weren't going to**
8 **be able -- it seemed like it was going to the**
9 **point where we weren't even going to be able to**
10 **get gold reagent; that we should at least be able**
11 **to run an assay using gold reagent.**

12 **Q And at that time, you understood that**
13 **the gold reagent for CD4 was proprietary to**
14 **PointCare; right?**

15 **A No. When we were at Medica, we found**
16 **multiple vendors of gold reagent. So, gold**
17 **reagent is a known commodity.**

18 **Q From -- by whom?**

19 **A I don't know. I don't have any**
20 **direct knowledge of who.**

21 **Q I thought you said at Medica you**
22 **found a bunch of folks who could sell it to you.**

23 **A Yeah. Roger Borray had met with some**
24 **and told me, yeah, we could probably do this.**

25 **Q So, it's your understanding that here**

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1 F. Matuszak

2 **you were referring to the availability of gold**
3 **antibodies for CD4, other than PointCare's**
4 **proprietary assay?**

5 **A But our understanding was that we**
6 **wouldn't be infringing on any proprietary**
7 **information that PointCare had.**

8 **Q That is not quite my question. I'm**
9 **asking for you to explain what you meant here when**
10 **you wrote that "Drew should find another**
11 **manufacturer of gold antibodies for CD4."**

12 **Is it your testimony that you meant**
13 **that someone at Drew had told you that there were**
14 **other gold antibodies for CD4 that other folks**
15 **were manufacturing and you could go buy from them?**

16 **A Yes.**

17 **Q And who told you that?**

18 **A I believe Roger Borray had mentioned**
19 **it to us.**

20 **Q When did he tell you that?**

21 **A Probably sometime after Medica in**
22 **'07.**

23 **Q And then at the end of the sentence**
24 **you say, "that Drew should also find out if we can**
25 **get the accelerant analyzed to see what is in it."**

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1 F. Matuszak

2 **What did you mean by that.**

3 **A To do an analysis.**

4 **Q What accelerant?**

5 **A I'm not technical.**

6 **Q I didn't mean that technically.**
7 **A PointCare accelerant.**

8 **A I'm not entirely sure if it was a**
9 **PointCare accelerant or if there were other**
10 **accelerants out in the market.**

11 **Q The accelerant that Drew had**
12 **anticipated using for the HT was a PointCare**
13 **accelerant; right?**

14 **MR. COSTANTINI: If he knows.**

15 **Q Please don't tell me anything you**
16 **don't know, sir.**

17 **A It may have been a PointCare**
18 **accelerant.**

19 **Q And you understood at the time that**
20 **PointCare's accelerant was proprietary to it;**
21 **right?**

22 **A Yes.**

23 **Q And you were suggesting to**
24 **Mr. Nickols that Drew should find out if it could**
25 **analyze the accelerant and see what's in it so**

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1 F. Matuszak
 2 Drew could manufacture its own accelerant; right.
 3 A No.
 4 Q Why is that not true?
 5 A To see if we could find an alternate
 6 source.
 7 Q Why would you need to analyze what
 8 was in PointCare's accelerant in order to find an
 9 alternative source for it?
 10 A To determine if, indeed, it was
 11 proprietary.
 12 Q How would analyzing it determine if
 13 it was proprietary?
 14 A The components would enable you to
 15 then do a patent search and see if it was
 16 proprietary, and then, given the documents that I
 17 have subsequently seen, there was no guarantee
 18 that this was a proprietary reagent.
 19 Q You wouldn't have to know the
 20 ingredients of the accelerant to do a patent
 21 search to see if it was patented, would you?
 22 A Yes. I believe, I'm not technical,
 23 again, but in my opinion you would need to know
 24 what was in something before you really would do a
 25 patent search, but I am not the technical person.
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1 F. Matuszak
 2 at Drew, at the time Drew was asking PointCare to
 3 take the HT and do some more work, how long it
 4 would be before you would have an instrument for
 5 sale?
 6 A I don't recall.
 7 Q Was that important to you, in
 8 December of '07, to know how long or short it
 9 would be before you had instruments to sell to
 10 your customers?
 11 A Well, there was far too many
 12 variables to even consider where we would be at.
 13 Q So, at that time you had no idea how
 14 close Drew and PointCare's effort was towards
 15 having an HT to sell?
 16 A Effort as well as the agreement.
 17 There are were too many variables to assign a --
 18 Q Fair enough.
 19 Did you have an opinion if, if, as
 20 you say, if PointCare had "backed off" and the
 21 parties had continued to work with the remaining
 22 tasks, did you have any understanding of how long
 23 you were looking at before you would have an HT
 24 product to sell?
 25 A Without the PointCare piece, without
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1 F. Matuszak
 2 Q My standard caveat, you are not the
 3 technical guy here. But at the time Herb Chow did
 4 his testing, and do recall subsequent to Herb
 5 Chow's testing that Drew sent a letter to
 6 PointCare declaring that the HT was ready for
 7 PointCare to taking it and to do some further work
 8 on it?
 9 A Yes.
 10 Q At that point in time, as the head of
 11 sales at Drew, did you have an expectation of how
 12 much time all the rest of the work would take
 13 before you would have a product you could sell to
 14 your customers?
 15 A I would have no knowledge until the
 16 final testing or the final work that needed to be
 17 done with PointCare was completed, because that
 18 was a variable that we had no information on.
 19 Q Did you talk to any of your
 20 colleagues on the technical side, R&D,
 21 manufacturing, whatever, to get their opinion on
 22 how long you might be waiting before you had a
 23 product to sell?
 24 A I don't recall I had a conversation.
 25 Q Do you recall having any information
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1 F. Matuszak
 2 knowing what that timeline is, I think it would
 3 probably be whether, you are technical or not
 4 technical, it would be a guess.
 5 Q Would you agree with me, in a
 6 non-technical sense, there was still a lot of work
 7 left to be done?
 8 A Again, I can't guess, because I had
 9 no idea of how long the PointCare piece would be.
 10 Q You understood that Drew was shipping
 11 a prototype to PointCare; right?
 12 A I did not have any knowledge. I
 13 didn't have that understanding.
 14 Q Did you have any understanding of
 15 what state of completion the HT was when Drew
 16 wanted to ship it to PointCare, how far along it
 17 was in layman's terms?
 18 A No.
 19 MR. COSTANTINI: I don't know how far
 20 you are from the end. We would like to take
 21 a break if are you a long time from the end;
 22 if you are near the end --
 23 MR. CAPLAN: How about if we take a
 24 break, and I will still promise to be close
 25 to the end.
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From: Doug Nickols
Sent: 12/14/2007 11:40:24 PM
To: Frank Matuszak
CC:
Subject: FW: 2280 cd4

It's too premature to over-commit to something as soon as first of February in India, especially since we just left PA with the objective to get our current efforts on XL2280 in line. CD4 can't be trusted until the basic XL2280 is defect free. I wish you would have discussed with me first, since we're a ways off from productionization of the CD4 to send an instrument that far away that soon. Would suggest our first field instrument be a little closer to home and we get the Pointcare portion ironed out.

When we started seeing problems with the machines at Pointcare back in May, 2007, we stopped work on the preproduction instruments. They were near completion in assembly, but we pulled and modified some components for experimental parts to resolve the technical issues. Additionally, these instruments were Aurica instruments and they now will be modified to Drew instruments. Lastly, unlike the XL2280, we WILL go thru Test and QC before submitting them for all the validation. If you recall, that validation will take us at a minimum 1 month, that's if we run 24 hours a day. All of these preproduction instruments will be consumed in validation with one instrument coming out the end in a condition suitable for external evaluation. I caution anyone in taking it to the other side of the world as our maiden voyage. As soon as we clear the 3 thru QC, we will begin another set of instruments as originally planned thru the production process as long as we have all the documentation ready to do so. This production run will validate the instructions and documentation necessary to build instruments consistently.

With that said, I'm encouraged by Gary pulling together a "to-be-finished" list (attached) today. I think a little of it is me being on site and stressing the sense of urgency, but more of it is knowing we now have a working prototype to leverage off of.

We can talk more about the CD4 project when we're together in State College, PA next week. Hope you make it home safely.

Regards,

Doug Nickols
214-210-4923 (direct)
214-210-4900 (main line)
214-210-4949 (fax)
dnickols@drew-scientific.com

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HIGHLY CONFIDENTIAL



DR00051480

From: Gary Young
Sent: Friday, December 14, 2007 3:58 PM
To: Doug Nickols
Cc: Tim Barker; Alta Hill; Phil West; George Chappell; William Ross
Subject: RE: 2280 cd4

The attached listing contains the major tasks and parts shortage for completing the five CD4 units currently in stock at Drew.

Three are in Assembly and two are in the Engineering Lab

The only Purchase part we appear to be short on is the ultrasonic sensor. It is on order and due in on Dec. 20th.

We are short several Manufactured parts which need the documentation updated prior to manufacturing.

Please review the attachment and provide me with dates you can respond to these requirements

If you have any questions, please call me.

Regards,

Gary

From: Doug Nickols
Sent: Friday, December 14, 2007 7:24 AM
To: Gary Young
Cc: Tim Barker; Alta Hill; Phil West; George Chappell
Subject: FW: 2280 cd4

I expect by now all the parts required for the 3 Drew CD4 instruments are in either in Alta's or Tim's hands for procurement. Please confirm. Reference my email attached dated 11/30/07.

Please put together a shortage list of all the components necessary to complete these instrument(s) and the remaining prototype due to Pointcare by end of business today. Phil should be able to assist. Lising should include what, when, who and status. This status needs to be updated at least twice weekly and distributed to each of the stakeholders (Phil, Tim, Alta, Ed, George, myself and whoever else you think is key to there successful completion).

Keep in mind, these 3 instruments will be going thru Test and QC.

Thanks,

Doug Nickols

214-210-4923 (direct)

214-210-4900 (main line)

214-210-4949 (fax)

dnickols@drew-scientific.com

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From: Frank Matuszak

Sent: Thursday, December 13, 2007 10:16 PM

To: Doug Nickols

Subject: 2280 cd4

Doug,

We have the opportunity to have some good sales in India based on the cd4, I told one of the labs we could be possible prepared to get an evaluation system to India in the beginning of Feb.. Given that we think the hardware is set should we not start sending the unit out for emc and electrical safety testing. Also how many could we build based on parts availability, I know that the sheer valve in use is prototype material and if that is a long lead time items we would need to start moving on ordering some.

Just keeping you up to date and hopefully Pointcare backs down but we should in the meantime also find out another manufacturer of gold antibodies for cd4 as well as find out if we can get the accelerant analyzed to see what is in it.

Regards,

Frank Matuszak
VP of Sales
Drew Scientific a division of Escalon Medical
565 East Swedesford Rd, Suite 200
Wayne PA 19087
Phone: 732-768-9694
Fax: 214-210-4949
Email: fmatuszak@escalonmed.com
SKYPE frankmatuszak

Attachment: CD4 Shortage List and Pending Tasks.doc

Exhibit E

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 DREW SCIENTIFIC, INC.,
6 Plaintiff,

7 vs.

Case No.

08 CV 1490-AKH

8 POINTCARE TECHNOLOGIES,
9 INC.,

10 Defendant.
11

12 -----X

13 DEPOSITION OF LINSEY ROCKINGHAM

14 New York, New York

15 Thursday, April 3, 2008

16 Contains Confidential - Attorneys' Eyes Only Portions
17
18
19
20
21
22

23 Reported by:

24 JOAN WARNOCK

25 JOB NO. 15878

<p style="text-align: right;">Page 2</p> <p>1 2 3 April 3, 2008 4 9:50 a.m. 5 6 Deposition of LINSEY ROCKINGHAM, 7 held at the offices of Duane Morris, 8 LLP, 1540 Broadway, New York, New York, 9 before Joan Warnock, a Notary Public of 10 the State of New York. 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 3</p> <p>1 2 APPEARANCES: 3 4 DUANE MORRIS, LLP 5 Attorneys for Plaintiff 6 1540 Broadway 7 New York, New York 10036 8 BY: ANTHONY J. COSTANTINI, ESQ. 9 -and- 10 DUANE MORRIS, LLP 11 Attorneys for Plaintiff 12 470 Atlantic Avenue 13 Suite 500 14 Boston, Massachusetts 02210 15 BY: BEN KURUVILLA, ESQ. 16 17 18 19 20 21 22 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
<p style="text-align: right;">Page 4</p> <p>1 2 APPEARANCES (Cont'd.) 3 4 BURNS & LEVINSON, LLP 5 Attorneys for Defendant 6 125 Summer Street 7 Boston Massachusetts 02110 8 BY: ANDREW F. CAPLAN, ESQ. 9 10 ALSO PRESENT: 11 FRANCIS MATUSZAK, DREW SCIENTIFIC 12 RICHARD DePIANO, DREW SCIENTIFIC 13 PETRA B. KRAULEDAT, POINTCARE 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 5</p> <p>1 L. Rockingham 2 LINSEY ROCKINGHAM, 3 called as a witness, having been 4 duly sworn by a Notary Public, was 5 examined and testified as follows: 6 COURT REPORTER: Please state your 7 name and address for the record. 8 THE WITNESS: Linsey Elizabeth 9 Rockingham, 4 Worcester Street, Belmont 10 Massachusetts 02468. 11 EXAMINATION BY 12 MR. COSTANTINI: 13 Q. Good morning, Ms. Rockingham. How 14 are you? 15 A. Good morning. 16 Q. I've introduced myself to you 17 already and to the other people in the room, 18 but I'm going on the record now. My name is 19 Tony Costantini with the Duane Morris law 20 firm, and I'm representing Drew and Escalon 21 in this matter, and I'll be asking you 22 various questions. 23 Have you ever given sworn testimony 24 before? 25 A. No.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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1 Attorneys' Eyes Only - L. Rockingham
 2 and what you remember, please.
 3 THE WITNESS: Okay.
 4 A. I don't remember the exact date.
 5 Q. How long ago was it? And today is
 6 April 3rd, if that helps.
 7 A. It was sometime this year.
 8 Q. Well, we could go through lots and
 9 lots of emails between you and potential
 10 Russian distributors that occurred this year,
 11 so I'm assuming that you did not continue to
 12 have such emails after Dr. Krauledat gave --
 13 A. Correct.
 14 Q. -- such an instruction. But is
 15 your recollection any better of how recent
 16 the instruction was other than sometime in
 17 2008?
 18 A. March 2008.
 19 Q. And did you respond to Mr. Tuora's
 20 email of March 10th in any form?
 21 A. No. Oh, yes, I did. Sorry. I
 22 did.
 23 Q. In what form did you respond?
 24 A. I spoke to him on the phone.
 25 Q. And can you recount that

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1 Attorneys' Eyes Only - L. Rockingham
 2 conversation as best you can recall?
 3 A. I told him that we were putting our
 4 plans for Russia on hold.
 5 Q. And how long after this March 10th
 6 email did that conversation occur?
 7 A. Very soon afterwards.
 8 Q. In addition to the three Russian
 9 distributors we covered, or potential Russian
 10 distributors, I think you told me about
 11 Block, I think you've told me about DRG, and
 12 you've told me about Cormay. Did you have
 13 discussions with any other potential Russian
 14 distributors? Let me broaden it to say
 15 communications, because I realize a lot of
 16 things are done by the internet these days.
 17 A. I don't remember.
 18 Q. And you told me as to the
 19 conversation you had with Dr. Krauledat about
 20 her meeting with DRG at Medica and her
 21 reasons for not going forward with them. Did
 22 she report to you about her meeting with the
 23 Cormay representatives at Medica?
 24 A. Yes.
 25 Q. What did she say?

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1 Attorneys' Eyes Only - L. Rockingham
 2 A. She said that she had met them at
 3 Medica and they were also a distributor for a
 4 company called Orphea.
 5 Q. And who had she met with?
 6 A. She had met with the senior
 7 Mr. Tuora.
 8 Q. And did she convey to you any
 9 impressions of that meeting?
 10 A. Yes.
 11 Q. And what were those impressions
 12 that she conveyed?
 13 A. That she thought that they were a
 14 good company because they already were a
 15 distributor for Orphea.
 16 Q. And who is Orphea?
 17 A. Orphea is another medical device
 18 distributor.
 19 Q. What types of medical devices do
 20 they distribute?
 21 A. I only know of one.
 22 Q. And what is that one that you know
 23 of?
 24 A. It's one that is manufactured by
 25 C2.

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1 Attorneys' Eyes Only - L. Rockingham
 2 Q. And C2 was also the manufacturer of
 3 the NP machines; is that correct?
 4 A. Correct.
 5 Q. And this C2-manufactured device,
 6 what does it do? Orphea's device, not yours,
 7 what does it do?
 8 MR. CAPLAN: Objection.
 9 A. I'm not sure.
 10 Q. You just know it's some kind of
 11 medical device that Orphea makes -- or that
 12 C2 makes for Orphea?
 13 A. Correct.
 14 Q. And subsequent to the time that you
 15 had the conversation -- or let me ask you,
 16 first of all, the conversation that you had
 17 with Dr. Krauledat in terms of her
 18 impressions of Cormay, how long after the
 19 Medica conference did that conversation
 20 occur?
 21 A. I didn't have a conversation.
 22 Q. Was it an email communication?
 23 A. Yes.
 24 Q. How long after the conference did
 25 that email communication take place?

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Exhibit F

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4

5 DREW SCIENTIFIC, INC.,)
6) Case No.
7 Plaintiff,) 08 CV 1490-AKH
8)
9 vs.)
10)
11 POINTCARE TECHNOLOGIES, INC.,)
12)
13 Defendant.)
14 -----)

15 DEPOSITION OF JAMES GARY YOUNG
16 New York, New York
17 Wednesday, April 9, 2008
18
19
20
21
22

23 Reported by:
24 KRISTIN KOCH, RPR, RMR, CRR, CLR
25 JOB NO. 16196

Page 2

April 9, 2008
9:24 a.m.

Deposition of JAMES GARY YOUNG, held
at the offices of Duane Morris, LLP, 1540
Broadway, New York, New York, before
Kristin Koch, a Registered Professional
Reporter, Registered Merit Reporter,
Certified Realtime Reporter, Certified
Livenote Reporter and Notary Public of the
State of New York.

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Page 3

APPEARANCES:

DUANE MORRIS, LLP
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1540 Broadway
New York, New York 10036
BY: JOHN DELLAPORTAS, ESQ.
ANTHONY J. COSTANTINI, ESQ.

BURNS & LEVINSON LLP
Attorneys for Defendant
125 Summer Street
Boston, Massachusetts 02110
BY: MICHAEL P. TWOHIG, ESQ.

ALSO PRESENT:

PETRA KRAULEDAT

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Page 4

IT IS HEREBY STIPULATED AND AGREED
by and between the attorneys for the
respective parties herein, that filing and
sealing be and the same are hereby waived.
IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form
of the question, shall be reserved to the
time of the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to
and signed before any officer authorized
to administer an oath, with the same
force and effect as if signed and sworn
to before the Court.

- oOo -

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JAMES GARY YOUNG,
called as a witness, having been duly sworn
by a Notary Public, was examined and
testified as follows:

EXAMINATION BY
MR. TWOHIG:

**Q. Good morning, sir. Could you just
state your full name for the record, please.**

A. James Gary Young.

**Q. And could you give us your
residential address.**

A. 2441 McAlpin Road.

Q. How about your business address?

A. 4230 Shilling Way.

Q. Who do you work for?

A. Drew Scientific, Incorporated.

Q. What's your position there?

A. I am a mechanical engineer.

Q. Do you have any other title?

A. I have many titles, but mechanical
engineer, manufacturing support engineer, those
are my chief titles.

**Q. Do you sometimes have another title
associated with projects that you are involved**

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1 Young
 2 **Q. Has your title or position changed**
 3 **over time with Drew Scientific?**
 4 A. Yes, sir.
 5 **Q. Can you tell me what the change was?**
 6 A. I moved away from doing chiefly
 7 design work and I moved more into project
 8 management, being a project liaison, supporting
 9 the engineering staff and assisting them in
 10 achieving their goals, offloading some of the
 11 work, the more mundane work, such as ordering
 12 parts and doing research and things like that.
 13 **Q. Did you step into that role because**
 14 **somebody else had left?**
 15 A. Yes, sir.
 16 **Q. And who was the person who left?**
 17 A. Andrew Kenney.
 18 **Q. Was Andrew Kenney based out of the**
 19 **U.K.?**
 20 A. Yes, sir.
 21 **Q. So when Andrew Kenney was still**
 22 **employed by Drew Scientific, correct me if I am**
 23 **wrong -- he was employed by Drew Scientific;**
 24 **right?**
 25 A. Yes, sir.

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1 Young
 2 **project manager or project liaison from the**
 3 **outset of the project with PointCare?**
 4 A. Yes, sir.
 5 **Q. And so how was Andrew Kenney**
 6 **functioning at the outset then?**
 7 A. Andrew Kenney would oversee, to a
 8 large extent, what I did.
 9 **Q. He was in the U.K. doing that,**
 10 **though?**
 11 A. No, sir, he was not. He divided his
 12 time between the U.K. facility and the Dallas
 13 facility.
 14 **Q. And based on your observations at**
 15 **the time, what was the division in terms of**
 16 **percentage of time at Dallas versus percentage**
 17 **of time in the U.K.?**
 18 A. I don't recall. It's roughly 60/40.
 19 **Q. Which way?**
 20 A. U.K. 60 percent, Dallas 40 percent,
 21 roughly.
 22 **Q. Now, just real quickly since we are**
 23 **on the topic, Karl Gu is another employee of**
 24 **Drew Scientific, right?**
 25 A. Yes, sir.

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1 Young
 2 **Q. So during the time when he was**
 3 **working for Drew Scientific he occupied that**
 4 **project management role?**
 5 A. He was the VP, vice president, in
 6 charge of engineering and R&D. He oversaw a
 7 lot of the project.
 8 **Q. What project are you talking about?**
 9 A. I am talking about the project with
 10 PointCare for the HT instrument.
 11 **Q. What was your first foray into**
 12 **project management with Drew Scientific?**
 13 A. The HT project.
 14 **Q. And were you the project manager, or**
 15 **what title did you have when you were working**
 16 **on the project?**
 17 A. We are not big on titles at Drew
 18 Scientific. My title was either engineering
 19 manager -- not engineering manager, excuse me.
 20 That's wrong. Was project manager or project
 21 liaison.
 22 **Q. Did you ever see project coordinator**
 23 **used also?**
 24 A. It may have been.
 25 **Q. Now, did you have that role as**

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1 Young
 2 **Q. And he worked with you on the HT**
 3 **project with PointCare?**
 4 A. Yes, sir.
 5 **Q. Did he have the role of software**
 6 **project manager?**
 7 A. Yes, sir.
 8 **Q. And was that role under you as**
 9 **project manager?**
 10 A. No, sir.
 11 **Q. So if we were doing an**
 12 **organizational chart, would you have put him**
 13 **kind of horizontally next to you?**
 14 A. It would be difficult to say where
 15 he fit exactly in the project in a tree.
 16 **Q. But I take it that you bore overall**
 17 **project management responsibility from the Drew**
 18 **perspective?**
 19 A. I was the project liaison between
 20 Drew and PointCare and in that respect I did
 21 have much of the responsibility.
 22 **Q. Okay. Was it your understanding**
 23 **that you needed to keep track of what Mr. Gu**
 24 **was doing?**
 25 A. I needed to know what Mr. Gu was

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1 Young
2 PointCare HT project?
3 A. There were two engineers, Vincent
4 Phan and Lee Carter, that were not directly
5 involved.
6 Q. And why were they not involved in
7 the project?
8 A. They were senior production support
9 engineers. Their function was to support the
10 existing product lines that we were currently
11 building.
12 Q. So were they slated to become
13 involved in the PointCare HT project at some
14 point?
15 A. No, sir. My understanding of their
16 function was to offload part of the
17 responsibility of supporting the manufacturing
18 line on to them to allow the regular
19 engineering staff to work more on the R&D
20 project or work more on R&D projects.
21 Q. Right, but at some point the HT was
22 supposed to get to a state of
23 manufacturability; right?
24 A. That is correct.
25 Q. So was there a plan to then involve
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1 Young
2 them in the process?
3 A. Yes, sir.
4 Q. It never got to that point; right?
5 A. No, sir.
6 Q. Now, who in management did you send
7 these timelines that you updated?
8 A. Doug Nickols and Andrew Kenney.
9 Q. Anybody else?
10 A. That's the management team that I
11 would report to.
12 Q. And Andrew Kenney you also
13 mentioned, I believe, he was vice president,
14 you said?
15 A. His title with Drew, I believe, was
16 vice president in charge of research and
17 development.
18 Q. What about Doug Nickols, what was
19 his title?
20 A. Doug has had several titles since he
21 has come on board with Drew. He was the
22 general manager, then he was president and
23 general manager, and then assumed the working
24 responsibility of being the engineering manager
25 at the same time, and then later on became just
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Page 40

1 Young
2 the engineering manager.
3 Q. Now, during the time period of the
4 PointCare HT project, what positions did
5 Mr. Nickols occupy?
6 A. Mr. Nickols became the acting
7 engineering manager in the fall of 2006.
8 Q. And at that point in time the HT
9 project was already under way?
10 A. Yes, sir.
11 Q. And was that about the time when
12 Mr. Kenney left?
13 A. Yes, sir. Actually, Mr. Kenney did
14 not leave the company. He was moved back to
15 the -- our facility that's in the U.K. in
16 Barrow-in-Furness.
17 Q. Is he still there?
18 A. Yes, he is still there.
19 Q. And prior to that, what was
20 Mr. Nickols doing prior to stepping into that
21 position?
22 A. He was the president, general
23 manager of the company.
24 Q. So that seems like a little bit of a
25 step down.
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1 Young
2 MR. DELLAPORTAS: Object to form.
3 A. When Mr. Nickols took over the
4 engineering management, he still retained his
5 title as president and general manager, and
6 it's only been in the last month that his title
7 has actually changed to just engineering
8 manager. He is no longer the president and
9 general manager of the company.
10 Q. And do you know why that decision
11 was made to take his title away?
12 A. No, sir. That's a top management
13 decision made at Escalon I am not privileged
14 to.
15 Q. Did somebody step in and occupy that
16 position?
17 A. Yes, sir.
18 Q. Who was that?
19 A. The gentleman's name is Mark
20 Wallace.
21 Q. Did he ever work on the HT project?
22 A. No, sir.
23 Q. Okay. Why don't we take a look at
24 the document that we marked as Exhibit 1. I
25 will let you flip through it.
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1 Young
2 (Document review.)
3 Q. If you could just familiarize
4 yourself with it and then I will just ask you
5 some basic questions and you can determine
6 whether you need to read it in more depth.
7 (Document review.)
8 Q. Let me just ask you a basic
9 question, Mr. Young. Do you recognize this
10 document?
11 A. No, sir, I don't.
12 Q. So I take it that you don't recall
13 that anyone at Drew ever circulated this
14 document to you?
15 MR. DELLAPORTAS: Object to form.
16 A. I don't recall seeing this document.
17 Q. Okay. Do you recall ever discussing
18 this document?
19 MR. DELLAPORTAS: Object to form.
20 I'm sorry. Objection. Asked and answered.
21 A. Segments of this document may have
22 been discussed in our meeting with PointCare
23 that would have been in May of 2006. However,
24 I don't recall seeing this exact document.
25 Q. Okay. So you do recall being in a
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1 Young
2 work that you just testified about took place
3 prior to the contract between PointCare and
4 Drew being entered into?
5 A. Yes, sir.
6 Q. Other than what you just testified
7 to, did you have any other participation in
8 let's call it pre-project work on this HT
9 project?
10 A. I don't recall any pre-project work.
11 Q. Other than what you just testified
12 to?
13 A. Other than what I testified to
14 assisting Roger Bourree.
15 Q. Did you have any discussion with
16 Roger with respect to the work that he asked
17 you to do?
18 A. Minimal. He had been in discussion
19 with people at PointCare. They had a good
20 understanding what they wanted. He just
21 conveyed that information on to me. I took it,
22 designed the parts, had them made, had them
23 delivered.
24 Q. So what information did he convey to
25 you about what PointCare wanted?
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1 Young
2 meeting with PointCare in May of 2006?
3 A. Yes, sir.
4 Q. And who do you recall being at the
5 meeting from the Drew side?
6 A. Myself, George Chappell, Jerry West.
7 I don't recall if Andrew Kenney was there. I'm
8 not sure about Andrew.
9 Q. Roger Bourree?
10 A. I don't recall Roger being there,
11 but that's not to say he wasn't. I just don't
12 remember him. He is not part of our normal
13 design team.
14 Q. Okay. Did you ever get a briefing
15 from Roger Bourree or anyone else at Drew
16 regarding the proposed HT project before the
17 contract was entered into and it started?
18 A. No, sir.
19 Q. You never did?
20 A. No, sir. I worked with Roger on
21 several occasions to get parts made, designed
22 and made, and sent to PointCare for them to
23 utilize on the Excell 22 that they were doing
24 some of their preliminary study work on.
25 Q. And is your recollection that that
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1 Young
2 A. One thing that comes to mind was a
3 small, low-volume cuvette that they needed
4 because the sample volumes that we were working
5 with -- they were working with, I mean to say,
6 were small and our existing design, the sample
7 was just swallowed up inside the huge volume of
8 the existing design.
9 Q. Okay. And when we are talking about
10 a low-volume cuvette, what was going to be
11 going into that low-volume cuvette?
12 A. Roger never explained that to me.
13 Q. Did you know at that point
14 pre project or I should say pre contract that a
15 medical device was contemplated that would be
16 performing an assay?
17 A. I can't say with certainty that it
18 was presented to me the way that you said it.
19 However, since it was an analyzer, it was
20 reasonable deduction to assume that it would be
21 something along that line.
22 Q. Did you make that assumption?
23 A. Yes, sir.
24 Q. Did anybody actually explicitly tell
25 you what was being contemplated?
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1 Young
2 that needed to be done to build each of these
3 subsystems.
4 **Q. Okay. Just continuing on looking at**
5 **this, talking about the timeline here, do you**
6 **have an understanding about the -- let's call**
7 **them horizontal bars and initials over on the**
8 **right side of the document.**
9 A. I see those.
10 **Q. Do you have an understanding of what**
11 **those signified?**
12 A. That would normally signify a start
13 date and a completion date and the bar would
14 represent the period of time between them.
15 **Q. Okay. And that's the way you read**
16 **this document?**
17 A. That's the way I would interpret
18 that, yes, sir.
19 **Q. Okay. And what about the initials**
20 **next to those bars?**
21 A. Those initials would be the person
22 who was responsible for that task or that
23 operation.
24 **Q. Or group of people?**
25 A. Yes, sir.

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1 Young
2 **why don't we start with number 13. You see**
3 **that there the title is Development of Selected**
4 **Modules?**
5 A. Yes, sir.
6 **Q. Do you understand or do you have an**
7 **understanding of what is meant by development**
8 **of selected modules in the context of this**
9 **timeline?**
10 A. The term "development of selected
11 modules" would be encompassing the items that
12 are listed below it. The items listed below
13 Development of Selected Modules would be
14 subsystems, as I refer to them, that are
15 required for the completion of the task titled
16 Development of Selected Modules.
17 **Q. Okay. So, for example, let's take a**
18 **look at line 14, Mixing. Do you understand**
19 **that to be referring to the task of creating a**
20 **mixing module for the HT device?**
21 A. In this particular case mixing is a
22 very generic term. Mixing takes place on
23 several levels. It could be interpreted in
24 several different ways. There was a cuvette
25 system that did have mixing associated with it.

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1 Young
2 **Q. And is that the way you understand**
3 **this document?**
4 A. That's the way I would understand
5 it, yes, sir.
6 **Q. Is it, in fact, the way you**
7 **understand it?**
8 MR. DELLAPORTAS: Object to form.
9 Asked and answered.
10 MR. TWOHIG: Go ahead.
11 A. That is the way that I understand
12 the document.
13 **Q. Okay. And is that based on your**
14 **experience in the industry?**
15 A. It's based on my understanding of
16 the way Gantt charts work.
17 **Q. Okay. And are Gantt charts commonly**
18 **used with projects that you work on?**
19 A. Not commonly, but I have used them
20 in the past.
21 **Q. And have you used them in the**
22 **context like this of a project timeline?**
23 A. Yes, sir.
24 **Q. Okay. Taking a look at some**
25 **specific line items, now, if we look down --**

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1 Young
2 There is also mixing that takes place on the
3 CBC side, the blood count side, as well.
4 That's not typically associated with this, but
5 mixing is a generic term.
6 **Q. Well, let me ask you this: In your**
7 **understanding of the project and the**
8 **modifications that were contemplated to the**
9 **Drew instrument, were there modifications**
10 **contemplated for both of those aspects of**
11 **mixing that you just testified about?**
12 A. There were changes that had to be
13 made to both sides, if you want to refer to it
14 as the CBC side as well as the CD4 side, in
15 order to get the two systems integrated
16 together.
17 **Q. And did you understand that the task**
18 **of doing both of those, the changes on both**
19 **sides, fell to Drew?**
20 A. The hardware development would have
21 been largely, not completely, but largely
22 responsible for Drew. However, the --
23 **Q. Do you mean largely a responsibility**
24 **of Drew?**
25 A. Of Drew. However --

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1 Young
 2 **Q. Is that a yes?**
 3 A. No, that's a condition.
 4 **Q. Okay.**
 5 A. The system was ultimately to be
 6 proven by PointCare and so they would have the
 7 final say as to whether or not the subsystem or
 8 this aspect was working properly. Since they
 9 were the specialists in this technique and had
 10 developed the methods and methodology for doing
 11 this, we would be dependent upon them for
 12 making the final say as to whether or not it
 13 was acceptable or not.
 14 **Q. Okay. And is it your understanding**
 15 **that essentially what PointCare would do is**
 16 **take the hardware that you had modified and see**
 17 **what the outcome was when you ran that**
 18 **hardware?**
 19 MR. DELLAPORTAS: Object to form.
 20 A. Ultimately we felt like PointCare
 21 was responsible for proving that what we had
 22 designed was working properly.
 23 **Q. And did you have an understanding of**
 24 **how PointCare was going to go about proving it?**
 25 A. We would develop a prototype system.
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1 Young
 2 We would deliver that system to them. They, in
 3 turn, would operate the system and would
 4 critique it and give us a summary of what they
 5 felt like the shortcomings were and we would,
 6 in turn, go back, revise or redesign those
 7 subsystems to bring them up to meet the
 8 specifications they felt like we were short on.
 9 **Q. Okay. And so to just kind of follow**
 10 **up on your testimony there, did you understand**
 11 **that that is what PointCare was going to be**
 12 **trying to prove, whether the hardware that you**
 13 **had modified met the specifications?**
 14 MR. DELLAPORTAS: Object to form.
 15 A. Again, the responsibility was for
 16 PointCare to test the prototype unit and then
 17 determine whether or not it met the
 18 specifications.
 19 **Q. Just looking across that line 14,**
 20 **the mixing line where the initials DME are, do**
 21 **you see that?**
 22 A. Yes, sir.
 23 **Q. What does that stand for?**
 24 A. I do not recognize the initials DME.
 25 **Q. If I suggested that it was Drew**
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1 Young
 2 **mechanical engineering, would that be something**
 3 **that you would recognize?**
 4 A. No, sir.
 5 MR. DELLAPORTAS: Objection. Calls
 6 for speculation.
 7 **Q. Do you have initials that you refer**
 8 **to different divisions at Drew by, for example,**
 9 **the engineering group?**
 10 A. No, sir.
 11 **Q. So you don't know what DME refers to**
 12 **in that line then?**
 13 A. No, sir.
 14 MR. DELLAPORTAS: Objection.
 15 Mr. Young, if you could give me a
 16 minute to formulate my objections.
 17 Objection. Asked and answered.
 18 **Q. So let me ask you this: Going down**
 19 **to the next line item where it says Immunogold**
 20 **Delivery Module, is this another item that Drew**
 21 **was responsible for creating?**
 22 A. Yes, sir.
 23 **Q. Is it similar to the item in line 14**
 24 **where Drew would create this item in line 15**
 25 **and then PointCare would prove or try to prove**
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1 Young
 2 **whether it met specifications?**
 3 A. Yes, sir. But I would like to say,
 4 though, that it would not be proven on a
 5 subsystem by subsystem basis, if that's what
 6 you are implying, because all of the subsystems
 7 are integrated. None of them or few of them
 8 are capable of standing alone by themselves in
 9 doing anything or meaning anything.
 10 **Q. Okay. Would you test them, though,**
 11 **standing alone initially?**
 12 A. We would verify that they met the
 13 specification for that segment that they were
 14 designed for.
 15 **Q. Okay. Now, just to jump ahead a**
 16 **little bit, if you go down to line 23 where it**
 17 **says "hardware integration," so would you agree**
 18 **that it is contemplated in this timeline that**
 19 **the various modules, line 14, for example, line**
 20 **15, another example, are then going to be**
 21 **integrated?**
 22 A. I think that's a safe assumption.
 23 **Q. Okay. And with respect to the**
 24 **integration, if you look at line 24, CD4 mixing**
 25 **module, was that a task that fell to Drew?**
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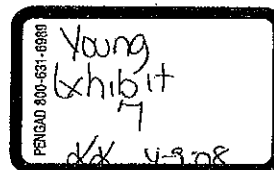
8

From: Andrew Kenney
Sent: 5/22/2006 2:57:20 PM
To: Jerry West; George Chappell; Gary Young; Karl Gu; Rodger Bourree
CC:
Subject: CD4 Meeting

Can we have a meeting tomorrow, Tuesday, 9am your time to start the ball rolling. A key decision is to identify what extra help we are going to need to get the job done asap. Pls call me on skype.

Andrew

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DR00006709

20

From: Doug Nickols
 Sent: 10/2/2006 1:01:03 PM
 To: Gary Young; George Chappell; Karl Gu
 CC: Tim Barker; Lee Carter
 Subject: RE: Survival

I appologize for being out this week in CT. I feel like I'm laying it on the line, then leaving for the week. Sea Gull effect if you will.

With that said, I consider it necessary to comment further on Andrew's email below. Although he appologizes for bluntness, the situation is more serious than he thinks. Sales are deteriorating because we can't sell the same old stuff.

1. Besides the 2 strategies below (cut & deliver), we can't spend a whole lot of money doing it. We've used it up, so our key resource is every Drew employee. My intention is to spread your load so you can focus on development.
2. XL2280 wasn't a disaster. It's not over and that's my point!! We're doing much better than our product introduction last year and that was the first in many years. Somewhere in the project we thought our jobs were done and they're not. The toughest part is the last 2% and we have to have the intestines to get thru that part. Something will go wrong, but it's the immediate resolution that will make it only a distraction and not a problem. In the coming months, when there's an XL2280 issue, get help and keep the problem resolution active to rapidly complete the task. Drew employees are proud of our XL22 and we can be just as proud of the XL2280.
3. "Urgency and responsibility" are the basics. We need ownership. If you go into a medical lab with a Drew product, I want you to proudly state that you designed that instrument and hear someone tell you how much they love it. If we don't do our jobs with urgency, our competitor's instrument will be in that lab. Think of Drew as your own business, and let's use those "business owner" traits to succeed.

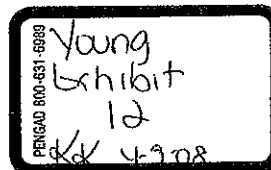
Enough of my preaching. Hope you get the point.

ADDITIONAL COMMENTS:

Don't spend any time discussing it this week, because IMMEDIATE DEVELOPMENT work is the top issue, but in the back of your mind consider the current way we are doing business and what we need to do to accelerate change. Time to completion is killing us, both for little tasks and for big. William has been added to the staff and from what I see is making an impact. Want your opinions, but my top two possibilities are:

1. Bring in a green Production Engineer with an electrical engineering background to complement Lee's work. First 2 months would be with Tuan testing instruments. First big project would be to complete outsourcing of pcb assemblies, including conversion to surface mount. Biggest problem is your time George to train him, but want your thoughts on how much

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DR00028389

production support that could actually lighten you of. The time Lee has available could then be spent on finishing up the Evolution productionization, then DS360 productionization.

2. Commission a Documentation Control person to handle the design and systems side of Engineering. (in the old days, before Lee was born, they called this person a Drafter). Gary, that would free up some time for you to lead the CD4 effort. My observation at the last CD4 meeting was that others ran it and releasing some of the distractions, Gary, should give more attention to overcome the control issues.(comments are not to offend, but to try and help progress).

Both these ideas require additional funding, but that's my problem to find.

All for now, Doug.

From: Andrew Kenney [mailto:andrewk@drew-scientific.com]
Sent: Friday, September 29, 2006 9:20 AM
To: Gary Young; George Chappell; Karl Gu
Cc: Jerry West (remote); Doug Nickols
Subject: Survival

By now you will all have had a chance to read the Escalon press release regarding fiscal 2006. The \$2 million loss is unsustainable and many changes are being made to rectify this situation. The strategy is twofold - cut costs and deliver more products.

The DS360 project is crucial and I need to spend the bulk of my time in the UK to make this happen on time. With my continued unavoidable absence, I have asked Doug and Lee to be available for resolving priority conflicts and resource allocation issues on a day to day basis.

The 2280 release for sale was a disaster and we must not let this happen again for CD4. We must develop a sense of urgency immediately and begin to take responsibility for our own futures and that of the company.

If you see a job that needs doing it's yours - don't wait for someone else to come along. Without releasing new products we will not survive. All of our jobs are at risk.

First priority is 2280 - nothing else must go wrong.

Second priority is CD4. We must catch up with the time line. If more help is needed either with subcontractors, equipment, parts, tools, whatever then say so immediately either to me or to Doug. Nothing must get in the way of a timely, high quality delivery.

An updated task list is attached. The other issues must be addressed but not so that they interfere with the 2280 or CD4 projects.

Sorry to be so blunt but this really is the last chance to save ourselves. We can make a big difference to the success of the company and we must.

Andrew

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DR00028391

From: Doug Nickols
Sent: 10/31/2007 3:19:29 AM
To: Gary Young
CC:
Subject: RE: CD4 update

You'll have to explain your scheduling verbally.

I don't understand why item 1 is dependent on items 2 & 3 to complete it's testing.

Additionally, we don't have 2 to 3 weeks, since 2 to 3 weeks turns into 4 to 6 or longer for this project. If only "moderate improvement" is the resultant of item 2, can we drop this effort and follow up with a design improvement after we deliver the 2 working instruments to Pointcare? We've proven the hypothesis and measured the results, which is sufficient for now.

What items must be ordered for item 3 to work, or is all of it off-the-shelf or machine shop proto's? How can we shorten 1 week into days?

We discussed last week disproving Pointcare's assumption that the lysing of red cells wasn't taking place correctly. Have we disproved that assumption? Do we have documented data showing our findings?

Let's discuss as soon as you get in. We've got to show results and quickly.

Regards,

Doug Nickols
214-210-4923 (direct)
214-210-4900 (main line)
214-210-4949 (fax)
dnickols@drew-scientific.com

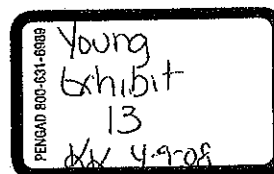
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-----Original Message-----

From: Gary Young
Sent: Tuesday, October 30, 2007 5:28 PM
To: Doug Nickols
Subject: RE: CD4 update

Item 1:

HIGHLY CONFIDENTIAL



DR00051241

George had two cuvettes made. One with the port from the side and one with the port from the bottom. The only one he has tested is the side port design. Testing of the bottom port design should only take two or three days. When the testing takes place will depend on items 2 and 3.

Item 2:

George cannot give me a date on this. It's too early in the testing. If we implement it, it will require a major change to a PCB. To me, this would imply two or three weeks including redesign, fabrication, firmware, and testing.

Item 3:

This will require adding one or two General valves, plumbing changes, and deck mods. I estimate one week to fab and test.

One other item I failed to mention earlier is a problem George thinks is a reflected light issue inside the flowcell area. He's had William remove the optichead and add a mask to the flowcell on the CD4 PMT side. William has completed this task and realigned it. George is working on it again. The results from test have yet to be determined due to a drift now being seen in several channels. Cause of the drift is unknown at this time.

Gary

-----Original Message-----

From: Doug Nickols

Sent: Tuesday, October 30, 2007 3:58 PM

To: Gary Young

Subject: RE: CD4 update

When will testing be conclusive and changes firm. Got to have a realistic date. We're on the line now and must have results very quickly.

Doug

-----Original Message-----

From: "Gary Young"

To: "Doug Nickols"

Sent: 10/30/2007 3:50 PM

Subject: CD4 update

10-30-2007

1. George has completed the installation and modifications to the new CD4 lower cuvette. Modifications had to be made to get the Ultrasonic sensor to work. The air gaps are now consistent and don't break or close down as in the old design.

2. George has temporarily patched in a micro-stepping driver board for driving the injector. He has gone from half stepping the motor to eight stepping it. This should reduce the flow pulsations. This modification shows a moderate improvement in the CD4 super wide channel.

3. George has experimented with changing the fluid from sheath to diluent during the CD4 measurement. This test has demonstrated a marked improvement in the channel width and signal profiles (single sharp peak) on the extinction signal and reduction in the width of the signal from the super wide angle detection. This indicates there is an index of refraction issue between the two fluids.

As I know more, I'll send it to you.

Gary Young

From: George Chappell
Sent: 11/19/2007 6:33:34 PM
To: Peter Hansen (phansen@pointcare.net); Peter Hansen (ter.hansen@tmo.blackberry.net)
CC:
Subject: CD4

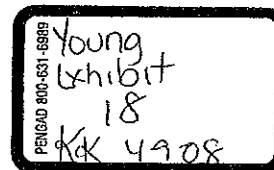
Hello Peter,

Please examine these data and tell me if I am on the right track. I have been using the times, speeds and volumes that Amy gave me and have been working on the mechanics and flow characteristics of the system to give me reliability and repeatability. I have incorporated the ultrasonic sensor into the mixing block and rearranged the plumbing such that the optic sensor for the accelerent and the ultrasonic sensor for the gold reagent are reliable. I also found that matching the sheath reagent to the reagent used to dilute the sample eliminates the signals that we thought were unlysed red cells. I was still having problems getting good separation between the CD4 negative and CD4 positive lymphs. That is why I started looking at the incubation time and temperature. I spent some time trying to eliminate stray light paths and reflections in the optical head, but found that once they were eliminated the CD4 positive signal was also gone. After you look at the data, we need to get together and decide how to proceed. I think that we are very close to having a system that will work.

GDC

Attachment: FCS_Study.ZIP
Attachment: Incubation_Study.pdf
Attachment: Time_And_Temp_Study.pdf

HIGHLY CONFIDENTIAL



DR00044803

Exhibit G

Drew Scientific
Marketing Plan
July 05
Updated July06 Rev1
Updated March 07 Rev2

1.0 Summary

The following report will detail our initial business plan at the start of the July 05-June 06 business plan for Drew Scientific. The plan will be updated yearly at this time or as needed based on business conditions.

All information in this report is confidential and should not be copied or reproduced.

2.0 The Enterprise

Drew Scientific is a wholly owned subsidiary of Escalon Medical. The company is currently based in three separate offices in Dallas TX, Oxford CT and Barrow UK the core business is in the manufacturer and sale of In Vitro Diagnostic (IVD) equipment and supplies in both the Veterinary and Human sectors. The company objective is to become a quality manufacturer of IVD products that will function in both fields.

At the end of the fiscal year June 2005 there were 108 employees who generated \$10.7 million dollars. This equates to approximately \$97,000 per employee which is below industry average.

Update -001 July 06

At the end of fiscal year June 2006 Drew reach sales of \$14.468 million with total employee number at 106. Total sales per employee were \$136,000 a \$40,000 increase over 2005. Total margin at standard for the same period was \$7.1 million equating to a 49% margin. This the first full year of data tracking these items and is drawn from the monthly sales report.

Update- 002 March 07

Sales to date have been \$8,031 this includes an instrument credit of nearly \$330k in reversed Trilogy sales. Total Margin dollars for the same period \$4.2 million equating to a total margin of 52% at standard. Total employee head count is not certain at this time but is estimated to be around 90.

2.1 Image Objectives

Drew Scientific has suffered over the last few years due mainly in part to a lack of operating cash. This resulted in poor product quality and little to no investment in new product development or marketing. We have made initial investments in expanding the sales force and we look to develop our distributor relationships. In addition we will actively market the Drew brand and look to expand our product offering and mix.

Update-001 July 06

Some improvement has been made towards product quality and we are slowly converting distributors back into the mix. We have had a difficult time in securing qualified vet distributors and the business as whole needs to be reevaluated.

Update- 002 March 07

Continued improvement in distributor relationships despite lack of new product releases.

US and ROW are primed and ready for new products to improve our product offering and increase sales. Some instability experienced in vet and research customers as we made the transition from CT to Dallas these issues are slowly being worked on and additional training of the Customer Service staff will continue.

2.2 SWOT

Drew has a number of strengths that should help us to achieve significant growth. These include;

Patented technology with respect to 5-part diff measurement principles in both the Vet and Human market.

A new and motivated sales force with a broad array of industry knowledge.

Fairly widespread distributor network worldwide.

Good reputation for A1C testing which is highly profitable.

Our limitations include;

Poor quality of produced systems.

Small organization compared to other players in the market.

Older product line which needs to be revamped.

Update 001 July 06

These SWOT items still remain in place today with little change.

2.3 The Future

There are a number of actions we would like to take to improve our competitive position in the future.

We intend to expand our distributor networks in the US.

In addition to our current products we look to augment our product offering by adding chemistry and immuno diagnostics to both the human and vet market.

We are looking to add new OEM products for the 3-part hematology market.

We expect to launch a new replacement for the HB gold system by Medica this year.

We are looking to improve our marketing and branding of Drew Scientific.

Update 001 July 06

We have begun to add key distributors on the US medical side however we have not been able to make any significant inroads on the vet side.

3 part OEM will be released within the next few months for ROW sales

DS360 project has no end in sight

We have released new marketing material for our Hearted line including a new brochure and CD.

3.0 Market Description

We will promote our products in two distinct markets. The veterinary field and the human market.

The veterinary field will be broken into two groups:

The research market- in this market we will continue our strong presence and continue selling via our referral network

The veterinary office lab- we will look to sell via direct sales where applicable and thru distribution in order to improve coverage.

The POL and Small Hospital Labs. The human field will concentrate in the POL and small rural hospital settings. We will sell via small regional distributors and with larger distributors on a nationwide basis. The two main products we will focus on in this market are our hematology products and our A1C testing products.

Update July 06

We continue to sell into the above mentioned markets

3.1 Environment

Technology is having a significant impact on the construction of medical equipment. Time to market for new equipment is being reduced along with the manufacturing costs to produce them. As a result, system improvements are being completed quickly causing major investments in R&D.

We will need to explore ways in which we can lower costs along with improving our development cycle time.

3.2 Target Market(s)

We will focus on three primary market segments with a minor focus on two others:

The first market is the veterinarian and research market. This market is attractive because there are relatively few players in the market and we are one of only three companies who have 5-part unit that the vets can afford. We will look to build our product offering in this market to attract a wider selection of distributors. In the research market we will

continue selling our unique system qualities as the dominant system for mouse testing worldwide.

The second market is the human hematology field. We have one of the few 5-part units available that is not with a major competitor. We provide an alternative to the smaller distributors who cannot or will not work with the big suppliers. We need to push the Excell-22 abroad and the Excell-16 in the US. This market will also benefit from obtaining a low cost 3-part unit that we can sell in the international market.

The third market is for A1C testing. This is a market that we have a good solid base of business. We expect that the new project X will provide us with some good potential next year but until then we need to lower our production costs on the DS5 and provide our distributors with an upgrade option from the HB gold to project X.

The OEM business is the smallest portion of our business with the smallest margins as well. We expect that the Bayer contract will not be extended which will result in a loss of 33K per month in instruments sales. An effort should be made to take on the existing Bayer business and if this is not feasible we should look to work with the regional Bayer branches to maintain our business. Primus is a competitor of ours in the A1C market and the project has never had wide acceptance at Drew. Financial problems within Primus make it difficult to predict what will happen in the future. We should look to decrease our dependency on these OEM agreements and augment our own target markets. Short term this will have a negative affect on the budget but long term we will be able to focus our R&D resources on our key markets.

Update July 06

Vet and Research testing market we have continued our strong growth in research testing. However, since no significant growth has occurred in the vet office testing market we will retrench around that market and look to protect our base business and target only high volume vet labs that can benefit from our unique technology.

Human Hematology- we are continuing to place the entire product line throughout the world and have plans to launch the new D3 within the next 3 months. We are also looking at pursuing OEM agreements for 22. Reduced cost version of the 22 will not be released for sale until Sept 06.

A1c Testing despite significant delays in new product offerings we have been able to sustain our level of A1C Testing worldwide. New product offerings must arrive in order to prevent consumable erosion from both a margin and volume standpoint.

OEM business continues to decline as expected on the Bayer side while Primus although doing well remains unstable as orders are quarter to quarter and the system is approaching obsolescence.

Chemistry business we have entered into a new market for Drew with some limited success. The unit appears to be well received but delays in 510k submission have resulted in delayed launch of the product in the US.

3.3 Prospect Description

Our products are sold worldwide and require an extensive use of distributors in order to reach our target markets. We have in place a good number of distributors in the international market but we need to develop distributors in the US. The development of key distributors in both the vet and human markets within the US are key to our continued success. The distributors will require a good deal of handholding in the near future in order for them to be comfortable with selling the benefits of our systems.

Update July 06

Building and improving our distribution network continues to be one of our key goals as this will improve both the image of Drew as well as increase and improve sales volume and margin.

3.3.1 Size

Boston Biomedical Consultants estimate that the entire global market for human IVD testing stands around 21 billion dollars. While the veterinary market stands about 1 billion dollars.

We compete on the human side in the hematology and diabetes testing portion of this market.

Hematology accounts for \$1.7 billion while diabetes testing accounts for \$2.6 billion of the global IVD testing. Other industry estimates have this figure at twice this number around \$5 Billion. In hematology the growth will be in the area of 7% while diabetic testing is expected to grow at a rate of 12%.

In the vet market we are selling in the hematology market and to a much lesser extent in the chemistry market. Hematology accounts for about \$158 million of the total market while chemistry accounts for \$193 million.

Update July 06

The chemistry Immuno-chemistry and coag markets are the largest segment of all the markets in diagnostics and will be targeting the smaller users of this market with the Trilogy test system.

3.3.2 Alternatives

Our customers have a wide range of suppliers who are capable of solving their problems. Drew must show to the customer that we are technically superior to our competitors or that our products provide more value from a total product offering. This will be a challenge in the near future as many of the products we offer are using much older technology that our competitors.

3.4 The Competition

In the human hematology market there are four key players in the market. They are Abbott, Beckman Coulter, Sysmex and Bayer. These four players account for the lion's share of the market with smaller players such as Drew accounting for the last 25% of the market. On a yearly basis we account for less than 1% of the total market. We have seen evidence of some new players within this field who could threaten our small market share.

The diabetic market is composed of several different markets but we are specifically involved in the A1C testing. We have several players in this market with the major players being Bayer, Tosoh, and Primus. Here again we have a very small share of the market and we see new players such as Metrika trying gain market share by simplifying the test so it can be run in the Dr's offices.

With the veterinary field we have several competitors. The three major players are Abaxis, Heska and Idexx. We have seen no less than 3-4 new competitors trying to enter into this field over the last 6 months. We currently have 2-3% market share in this field mostly from the results of Bob Canada.

All of these markets are coming under pricing and technology threats that need to be addressed quickly.

Update July 06

Clearly the addition of the Trilogy chemistry system has given Drew an added breath of product in the US and once cleared will open up and improve our sales in the hematology line by offering bundled product offering

4.0 Strategy

4.1 Products/Services

We currently offer both a 3-part and 5-part hematology unit to the human market. The 3-part unit is currently much older than the competitors' instrumentation. We plan on developing a lower cost unit with new features to introduce in the first part of 2006. We estimate that the new unit would have a life of 5 years and that we could sell approximately 1200 unit during the 5 years. With the current system we expect to sell less than 15 units internationally. We expect to have positive growth from the Evolution in the US only and expect to sell 50 units in the first year.

The 5-part system will have a price reduction towards the beginning of 2006 and we expect that this will enable us to retain our margins even with the declining price of 5-part units worldwide. Total units for the year are expected to be at 144.

In the diabetes business we expect that the HBGold business will collapse in the next 12 months. We are developing plans to lock up our customer bases so that they are not lost prior to the launch of project X. The DS5 business will have about 15 months of continued strong sales but we cannot expect that the business will last much beyond that. We will explore ways of increasing market share so that the installed base will carry us until a new system is developed.

In the vet market we will look to expand our superior 5-part system. The system is currently a stable product and we will look to educate the end user as to the benefits of using the Hemavet for their practice.

Update July 06

Human Hematology total instrument sales for 2006 where as follows:

ROW

Excell 18 total unit 06 37 units
Excell 22 total units 06 57 units

US

Excel 16 total units 06 11 units
Evolution total units 06 10 units
Excell 22 total unit 06 11 units

We exceed our number of units forecasted in Excell 18 and 16's but missed our numbers

on the 22's and Evolutions. The 22's had been a major portion of our budgeted sales in 06 which it had been expected to improve with the launch of the 2280 this however was delayed over 8 months and no units have been delivered to date.

Evolution lagged as well due to delay in product development. First Evolutions did not ship until Feb 06.

A1C

Total HBGold instruments sold 20 units 06

Total DS5

Row 157 units

US 11 units

Gold units continue on the decline. However we had a resurge in the DS5 that was not expected by marketing into markets that do not have issues with labor costs. This has enabled us to sell this product despite the manual nature of the unit. This does, however, impact our US customers who are expecting user friendly systems.

Hemavet

Total instrument sales

Total units including ROW, Vet and Research- 81 units

Total 1700 system \$30K sales very high end research 7 units

Hemavet sales while strong in the research and ROW did not exceed our expected forecast in the vet field. we are taking corrective action in this area of the sales force.

Trilogy

Total sales for 06 9 units as a product launch.

Update March 07

Hematology

Sales to date

ROW

Excell 18 dropped off as expected 4 units total although an order is expected for 20 in April

Excell 22/2280 25 units

D3 has begun to be sold in the ROW and to date we have sales of 25 units with orders for 25 in April and several tenders which would exceed 100 units in the first partial year of sales.

US

Evolution 27 units shipped to date with commitments from McKesson and Immulab driving the business

Excell22/2280 4 units to date

AIC

Sales are continued strong on the DS5 total unit sales of 76 units, sales have dropped off from last year and is to be expected since the unit has been on the market since 1993.

HbGold sales are non-existent.

Trilogy

Due to FDA issues the majority of the units sold in 06 needed to be returned creating a huge credit and inventory adjustment, although we did have 3 sales to research customers in 07.

4.1.1 Brand Names

Drew's image is disjointed, and not classy. Customers (End users and Distributors) don't have a "desire" to acquire a Drew Scientific unit. Prior Corporate acquisitions were never fully incorporated. Customers and Distributors are confused. Escalon acquisition needs to be well explained and the opportunity to build the Drew brand must be taken.

We will continue to fully incorporate the image of Drew as an Escalon subsidiary. Our focus will be on the Drew brand and we will look to eliminate all of the former trappings of MWI and CDC. These names are synonymous with poorly run companies at best and outright fraud in some of the worst cases.

Our image must be restored and will accomplish this by presenting a professional business appearance in all our business dealings. We also look to standardize our marketing communication plan across all of the three former companies. In order to achieve this we will need to link and tie together the companies with integrated phone and email services.

Update July 06

This process continues; all business units have been switched the Escalon server and all calls for Drew are either answered in Dallas for US and South America customers

and the UK for the ROW.

4.1.2 Packaging

Currently our packaging does not contribute to our marketing effort. It is to say the least plain and does not reinforce our branding of the Drew name. We should during the year examine new alternatives to our current packaging methods. We believe that how a product is package is an outward sign of the interior quality.

Update july 06

No progress has been made in this effort as of yet.

4.2 Pricing

Market pricing

Veterinary Market

Hematology

The Hemavet is currently competitively priced compared to the other 5-part units in the field within the US. We have had heard recently that the Melot unit is currently being sold for less and they are attempting to enter into the US market. This may have a negative effect on our pricing in the US but it will require that we monitor it for a period of time before an answer can be given. The international community is experiencing severe price erosion due to low cost 3-part units. Any new low cost 3-part unit for the human market should also have a potential in the international vet market. This will enable us to test the unit for vet applications prior to launch in the US.

Chemistry

The current price of the Pro-Chem is very competitive however the ease of use offsets this price advantage. Our main liability in this field is the high cost to manufacture our reagents and cuvettes. This prevents us from decreasing our price so that we can make aggressive moves to capture market share. In order to continue in this market we need to develop a new platform which can reduce reagent preparation costs so that we can place pricing pressure on the industry leaders.

Human Market

Hematology

The hematology line pricing appears to be holding well in the US but is under extreme price pressure in the rest of the world. A low cost 3-part is essential if we are to remain in this market. The 5-part market is also seeing a lowering of prices and we expect so lower cost units to hit the market within the next 6 months. Developments are being made to lower our production costs so that margins can be retained. Short term plan is to continue to base our deals on the entire margin of the deal and capture the reagent stream in order to improve our gross margins.

Diabetes

The DS5 capital investment is a barrier to increased sales. We need to provide our instruments to the field at a lower price so we can recognize the reagent stream.

Our instruments (pumps) are not being placed due to high capital investments. This places in jeopardy our continued profitable expansion of our reagent base. The value of a consistent reagent business can not be ignored as it is a residual revenue stream for a minimum of 5 years. We must look to increase our instrument market share in the next 12 months so that we can capitalize on that installed base when our new products come on board. It takes far less effort to upgrade an existing customer than it does to close a new one.

Update July 06

We are still experience price pressures in our capital equipment this is generally attributable to the fact that our material costs continue to remain high we have had minimal cost reductions in the 2280 instrument. The goal of the 2280 was to reduce costs on the system by \$1200 total cost reductions was only half that at \$600.

The Ds5 standard cost has nearly increased by \$1,000 in the last 2 years causing our margins to shrink even further and forcing us pull out of lower volume end users.

The Trilogy appears to be well priced at \$38k to distributors and the reagents will provide us with 60% plus margin to distributors and appears to be competitive as well.

4.3 Distribution

Our products will be sold through distribution.

In the US our distribution channels need to be developed. We expect to add no less than 15 new distributors in the human market this year. It is expected that each one of these distributors will have a sales organization of at least 5 sales reps. As you can see if these goals are realized we will have a significantly greater sales force in the US over the prior year. Much of our growth for the upcoming year will be tried to these new distributors. We expect that each one of our reps will spend a great deal of time with each distributor

educating them and supporting them in the sales cycle. By working with the distributors on a regular basis we will insure that our products are being talked about on a regular basis.

In the international market we will look to continue our relationship with existing distributors and look to expand into new territories. Each distributor will be visited at least twice a year to review the business and will allow us to communicate our expectations.

Update July 06

US Distribution has increased but not to our expected levels by the above goals. We have been able to sign on McKesseon corp in the following states Arkansas, Texas, Oklahoma and Mississippi. In these states they have 17 reps along with 3 instrument specialists. This was a tremendous achievement as McKesseon has signed agreement with Beckman and the area manager has instructed his reps to ignore the BC contract and work with us. In addition we added Immulab as mentioned earlier and this agreement is for 36 Evolutions in 06-07. We have also added Kreislers in the northwest but this has not amounted to any sales as of yet. Lastly we have received an order from MSB for 12 Trilogy systems over the next 12 months.

Update March 07

In the last quarter we have made significant strides in adding a large number of distributors in the US. Jan 07 marked the signing of IMCO along with the over 100 distributors that they have as part of the cooperative. We will be attending their yearly meeting in May 07 and they are ready to move with our chemistry and hematology product lines. We will be the sole provider of this equipment to IMCO.

4.4 Promotion

In order to maximize our sales this year we will look to promote our products with both a push and pull strategy.

The push strategy will be employed on our distributors. We will get them excited about selling the Drew product by incentivizing their reps. In the US we will look to spiff the distributor reps so that they lead with our product.

We will employ the pull strategy by starting an integrated marketing communications plan. We will look to publish reference articles on our products. Trade journal ads will be placed to raise the awareness of Drew as a company and supplier of diagnostic equipment.

4.4.1 Product/Service Image

We wish to improve Drew's image from its current state as a poorly run company to a company that is making rapid changes. We want to be perceived as a small company that can make new and novel ideas happen in a short period of time. It is imperative that we get customers to feel that exciting things are on the horizon with Drew. In this way we can get them to invest in our future and theirs.

Update July 07

In the last year we have made significant inroads in bringing new ideas into the company. In summary we have added 3 new products that will be ready for sale in the upcoming year.

D3
2280 CD4
Trilogy

Summer of 2007
DS360

4.4.2 Publicity

In order to promote our products we will look to establish a marketing

communications budget. This in the past has been limited and we need to be addressed in order to improve Drew's image. We will look to sponsor industry leaders so that they may speak about our products at regional trade shows. Print ads will also be used to communicate new product offerings. We will also look to develop CD mailers that provide interactive demos of our equipment.

4.4.3 Advertising

Our advertising plan is currently in development and we have a proposal from Lepoidevin group. This proposal will be reviewed and recommendations will be incorporated into this plan.

Update July 06

The Lepoidevin group was hired in 06 to form a marketing plan for the Hemavet product line it was anticipated that we would be able to have 3 territory managers that along with an integrated marketing plan that we could generate an extra \$2million in sales on the vet line. The marketing proposal included a new brochure and cd along with corresponding trade journal advertisements. The total budget for the year was \$100k which was on target. We however did not achieve the increased sales and the marketing plan was cancelled.

Update March 07

We have released a new brochure for the 2280 and D3 with minimal cost using Bluepole in the UK. The brochures look ok but lack the polish of having a high power marketing firm they do however provide the needed inflammation.

4.5 Customer Support

Our support structure needs to be reviewed and a service plan must be developed. We currently offer 1 year warranty on our products with service being performed on a direct and also thru our distributors.

Our international customers are almost exclusively serviced by our distributors. As such we need to provide our distributors with timely support in order for them to properly support our customer base. Currently we have one service engineer covering the entire world exclusive of the US. in anticipation of increased workflow we are currently recruiting an additional engineer. This additional engineer should be able to cover all of our needs for the next year. Our distributors as a result should expect to see greater support from us by the middle of this year. Replacement parts is an area of concern. We need to have a proper supply of spare parts in Barrow so that replacement parts can be sent out same day if needed.

The US service group is larger and will be called upon to do great deal of work in the next 12 months. We have many distributors being added that do not service our equipment. As a result we will be called upon to provide the service. In the short term we should look to employ third party service groups to fill the gaps we have. In the long term we will need to develop our service group so that we can control our costs and provide better customer service.

Update July 06

We have a need to place a leader who can pull the entire service group together. We have reviewed external candidates but will offer the WW sales manager position to Jay Robinson. He will relocate to Dallas in Dec 06.

Update March 07

The move to have Jay in the US has begun to payoff dividends. We have removed 2 service reps in Dallas who did not have the necessary skills. To replace these reps we have added Steve Siedel who is a 20-year veteran with Abbott hematology systems. We have also added a Med tech to answer calls in Dallas. The next 3 months will be spent training this group on all of our products.

5.0 Organization

5.1 Objectives

Near Term (next 12 months)

Introduce the Evolution

Increase our distributors in the US by adding 15-20 new distributors

Introduce a new low cost 3-part unit

Increase market awareness by implementing a marketing communications plan

Test market a new chemistry analyzer

Grow sales from 10.7 million to 15.5 million a 49% increase

Long Term

Establish Drew as a key player in the diagnostic industry

Increase our product range and offering

Triple Drew's current market share

Grow Drew into a 45-50 million dollar a year company

Update July 06

As mentioned we drove top line sales to \$14 million in 06 which was short of our desired goals. Evolution has been released but we still have several products that need to be launched. Long term goals remain the same.

5.2 Organization Factors

Our sales structure is flat and is comprised of the following:

Jeff Appleyard	European research and Marketing Manager
Roger Bourree development	Central & South America distributors and product
Andrew Buck	Sales Far East
Robert Canada	USA Research (Hemavet)
Tom Drew	East Coast Vet products
Christina Lampton	Central Coast Vet products
Weldon Eberhart	West Coast Vet products
Sam Hill	West Coast Hematology

David McCormick
Simon Rowe
Open Position
Frank Matuszak

M. East, Africa and India Sales
Eastern Europe
East Coast US Hematology
VP of Sales and Marketing

Updated July 06

During the year we reduced our vet force and removed Weldon Eberhart and Tom Drew due to poor performance. Additionally we lost Jeff Appleyard to Bayer which was a big loss for the sales team. We have elected not to find a replacement until we have enough products to warrant the investment in a full time marketing person. Additionally we have added 3 people to our technical staff to support and develop Trilogy.

Update March 07

In January we further reduced our sales force and removed Dave Mac for poor performance. Continued investment in the service department will take priority over sales force increases for if we cannot service our product we will be unable to increase sales due to poor customer service.

5.2.1 Marketing

Currently our total marketing group is comprised of Jeff Appleyard who is the marketing manager. In addition to Jeff we have a tradeshow coordinator Tammy who is part time. Tammy is responsible for coordinating all of the logistics with the tradeshow. Additional resources are needed in this area. The LePoidevin group may be a potential source for creative help in this area. We will also look to use some of the resources at Escalon. Jeneen Cunningham has had some marketing experience and we will look to use her skills in this area.

Update July 06

All of the above marketing support has left the company and have not been replaced until new products are available. Tradeshow are being coordinated by myself and Bob Canada. Major shows for the human market this year will be AACC and Medica. We will also attend local shows as needed that each sales rep will schedule as needed. The vet group will attend NAVC, Western Vet, ACVIM and ALAS as well as attend other shows by having our equipment in the booth and supporting the distributor with an instrument and a representative. Most other shows will be attended with Dan Scott as they attend all of the major and minor vet shows.

5.2.2 Sales

The range of experiences of the sales team is very varied. Training needs for each individual need to be assessed. Robert Canada is probably the most developed and experienced sales person. We have recently added a few sales people in the US. They have a good range of skills and they will be able to adapt easily into the organization.

Continued training will be a key to our success. The Vet sales team will have a meeting in August which will give the technical skills they need to sell with our distributors. We expect to have a full sales meeting in October which will cover product training as well as sales training.

All of our sales people have and are aware of the commission plan. The plans in the past were not a source of motivation since many times payments could not be made due to financial constraints.

Update July 06

With the current staff changes we now have an experienced group and no novices. Sam, Simon and Andrew are all running and moving their territories to new growth levels. Christina is being used to hold on to our base business in the vet side and doing a good job as well. Bob as usual continues to surpass past sales years.

Update March 07

The entire group attended a WW sales and service meeting in Dallas the meeting went well and we will strive to have a meeting once a year. Suggestions for the next meeting were noted and will be put in place for the next meeting. We talked about many new products on the way and it is believed that the new products are imperative to our growth.

6.0 Key Issues

7.0 Financial Projections

8.0 Charts

Projections to be included from budget templates